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In the Supreme Court of the United States

OCTOBER TERM, 1982

SECRETARY OF HEALTH AND HUMAN SERVICES,
PETITIONER

v.

LEON S. DAY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in the absence of any showing of bad faith, delays in the administrative adjudication of claims for disability benefits under Title II of the Social Security Act, 42 U.S.C. (& Supp. IV) 401 *et seq.*, arising from a substantial backlog of cases and resource limitations, violate claimants' statutory right to "reasonable notice and opportunity for a hearing" (42 U.S.C. 405(b)) and justify judicial imposition of time limits on the processing of such claims.

2. Whether, in the absence of statutory authorization, a court may enforce judicially imposed processing deadlines by requiring the Secretary of Health and Human Services to pay interim benefits from the Disability Insurance Trust Fund to claimants who have not been found entitled to such benefits but whose cases have not been decided prior to the deadlines.

PARTIES TO THE PROCEEDING

The petitioner is the Secretary of Health and Human Services. Richard S. Schweiker, the appellant in the court of appeals, resigned as Secretary effective February 4, 1983, and his successor has not yet been appointed. The respondents are Leon S. Day and Amedie Maurais, who are representatives of the following class of claimants for disability benefits under Title II of the Social Security Act, 42 U.S.C. (& Supp. IV) 401 *et seq.*:

> All present and future Vermont residents seeking to secure Social Security disability benefits who, following an initial determination by the [Secretary] that no disability exists, experience an unreasonable delay in the scheduling of and/or issuance of decisions in reconsiderations and fair hearings.

App. D, *infra*, 12a n.1.[1]

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[1] Respondents Day and Maurais had received an ALJ hearing and decision prior to the district court's certification of the class on June 14, 1979. The district court held that the case was not moot, however, concluding that the case fell within the exception recognized in *Gerstein* v. *Pugh*, 420 U.S. 103, 110 n.11 (1975), for situations in which the challenged condition is temporary and the issue as regards any particular class representative might become moot before the district court even could rule on the class certification issue. C.A. App. 78a. See also *Sosna* v. *Iowa*, 419 U.S. 393, 402 n.11 (1975); *United States Parole Commission* v. *Geraghty*, 445 U.S. 388, 398-399 (1980). The district court also found that respondents Day and Maurais would be suitable representatives of the class in these circumstances. C.A. App. 77a; see *United States Parole Commission* v. *Geraghty*, *supra*, 445 U.S. at 405-407.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provision involved	2
Statement	2
1. Background	2
2. The proceedings in this case	6
Reasons for granting the petition	11
Conclusion	24
Appendix A	1a
Appendix B	10a
Appendix C	11a
Appendix D	12a
Appendix E	21a
Appendix F	32a

TABLE OF AUTHORITIES

Cases:

Army and Air Force Exchange Service v. *Sheehan*, No. 80-1437 (June 1, 1982) 22

Barnett v. *Califano*, 580 F.2d 28 ..... 7, 8, 10, 12, 14, 15, 17

Blankenship v. *Secretary of HEW*, 532 F. Supp. 739 ..... 13-14, 17

Blankenship v. *Secretary of HEW*, 587 F.2d 329 ..... 10, 13, 15, 16

Califano v. *Yamasaki*, 442 U.S. 682 21

Caswell v. *Califano*, 583 F.2d 9 ..... 9, 12, 15, 17

Crosby v. *Social Security Administration*, No. 81-675-T (D. Mass. Nov. 16, 1982) ... 13, 16

Cases:—Continued Page

Federal Crop Insurance Co. v. *Merrill*, 332 U.S. 380 23

Finch v. *Schweiker*, No. Civ. Nos. C 75-0185 L(A), C 76-0441 L(A) (W.D. Ky. Feb. 17, 1982) 13, 14

FTC v. *J. Weingarten, Inc.*, 336 F.2d 687 . 16

INS v. *Miranda*, No. 82-29 (Nov. 8, 1982) . 23

Lassiter v. *Department of Social Services*, 452 U.S. 18 19

Lehman v. *Nakshian*, 453 U.S. 156 23

Little v. *Streater*, 452 U.S. 1 19

Martinez v. *Califano*, Civ. No. 73-C-900 (E.D. N.Y. Jan. 3, 1978) 12, 16, 17

Mathews v. *Eldridge*, 424 U.S. 319 ..... 4, 5, 18, 19, 21, 22

Open America v. *Watergate Special Prosecution Force*, 547 F.2d 605 20

Pine Hill Coal Co. v. *United States*, 259 U.S. 191 22

Richardson v. *Perales*, 402 U.S. 389 3

Schweiker v. *Hansen*, 450 U.S. 785 .... 11, 12, 23

Sharpe v. *Harris*, 621 F.2d 530 .... 10, 12, 16, 17

United States v. *Testan*, 424 U.S. 392 ..... 22, 23

Vermont Yankee Nuclear Power Corp. v. *National Resources Defense Council, Inc.*, 435 U.S. 519 21

White v. *Mathews*, 559 F.2d 852, cert. denied, 435 U.S. 908 ..... *passim*

Wright v. *Califano*, 587 F.2d 345 .. 10, 14, 15, 16

Constitution, statutes and regulations:

United States Constitution:

Article 1, Section 9, Clause 7 22

Constitution, statutes and regulations:—Continued

	Page
Due Process Clause (Fifth Amendment)	9
Administrative Procedure Act, 5 U.S.C. ...	9
Social Security Act, Title II, 42 U.S.C. (& Supp. IV) 401 *et seq.*	2
Section 205(a), 42 U.S.C. 405(a)	13
Section 205(b), 42 U.S.C. (Supp. IV) 405(b)	3, 4, 7, 11, 18, 19, 23
Section 205(g), 42 U.S.C. 405(g)	4
Section 205(i), 42 U.S.C. 405(i)	10, 22
Section 221(a), 42 U.S.C. 421(a)	3
Section 221(c), 42 U.S.C. 421(c)	3
Section 221(i), 42 U.S.C. (Supp. IV) 421 note	4
Section 223(a)(1), 42 U.S.C. (& Supp. IV) 423 (a)(1)	22
Section 223(d)(2)(A), 42 U.S.C. 423(d)(2)(A)	2
Social Security Act, Title XVI, 42 U.S.C. (& Supp. IV) 1381 *et seq.*	2
Section 1611(a), 42 U.S.C. 1382(a)	18
Section 1611(a)(2)(B), 42 U.S.C. 1382(a)(2)(B)	2
Section 1631(c)(2), 42 U.S.C. 1383(c)(2)	5, 18
Social Security Disability Amendments of 1980, Pub. L. No. 96-265, 94 Stat. 441 *et seq.*:	
Section 304(a), 94 Stat. 457	5
Section 308, 94 Stat. 458	6, 19
Pub. L. No. 97-455, 96 Stat. 2497 *et seq.*:	
Section 2, 96 Stat. 2498	6, 21
Section 3, 96 Stat. 2499	20
Section 4, 96 Stat. 2499	6, 21

Constitution, statutes and regulations:—
Continued Page
Pub. L. No. 94-202, Section 3, 89 Stat. 1135 20
20 C.F.R.:
Section 404.907-404.921 3
Section 404.929 4
Section 404.929-404.961 3
Section 404.967-404.983 4
Section 404.1503 3
Section 404.1615 3
Part 416, Subpart N 4

Miscellaneous:
128 Cong. Rec. (daily ed. Dec. 21, 1982):
p. S15963 21
p. S15964 21
p. S15965 21
Department of Health and Human Services, Office of Hearings and Appeals, *Key Workload Indicators* (Oct. 1982) 3, 5
Department of Health and Human Services, *Social Security Annual Report to the Congress for Fiscal Year 1981* (1982) 3, 4
Goldman, *Administrative Delay and Judicial Relief*, 66 Mich. L. Rev. 1923 (1968) . 16
J. Mashaw et al. *Social Security Hearings and Appeals: A Study of the Social Security Administration Hearing System* (1978) 11
Note, *Judicial Resolution of System Delays in Social Security Hearings*, 79 Colum. L. Rev. 959 (1979) 20

Miscellaneous:—Continued Page

Report of the Staff of the House Subcomm. on Social Security of the House Comm. on Ways and Means, 94th. Cong., 1st Sess., *Appeals Process: Areas of Possible Administrative or Legislative Actions*, (Comm. Print 1975) 19

Subcomm. on Social Security of the House Comm. on Ways and Means, 97th Cong., 1st Sess., *Social Security Hearings and Appeals: Pending Problems and Proposed Solutions* (Comm. Print 1981) 4

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Secretary of Health and Human Services, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-9a) is reported at 685 F.2d 19. The opinions of the district court (Apps. D & E, *infra*, 12a-20a, 21a-31a) are unreported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 10a) was entered on June 28, 1982, and a petition for rehearing was denied on September 17, 1982 (App. C, *infra*, 11a). On December 7, 1982, Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including February 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 205(b) of the Social Security Act, 42 U.S.C. (Supp. IV) 405(b), provides in pertinent part:

> The Secretary is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Any such decision by the Secretary which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Secretary's determination and the reason or reasons upon which it is based. Upon request by any such individual or upon request by a wife, divorced wife, widow, surviving divorced wife, surviving divorced mother, husband, widower, child, or parent who makes a showing in writing that his or her rights may be prejudiced by any decision the Secretary has rendered, he shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse his findings of fact and such decision.

STATEMENT

1. *Background*

Title II of the Social Security Act, 42 U.S.C. (& Supp. IV) 401 *et seq.*, provides, *inter alia*, for the payment of disability benefits to insured individuals who, because of physical or mental impairment, are unable to do their previous work or to engage in any kind of substantial gainful work that exists in the national economy. 42 U.S.C. 423(d)(2)(A). Disability benefits also are payable under the Supplemental Security Income (SSI) program established by Title XVI of the Act, 42 U.S.C. (& Supp. IV) 1381 *et seq.* See 42 U.S.C. 1382(a)(2)(B). Both statutory provisions require the

Secretary, in determining whether a claimant is disabled, to consider the claimant's physical and mental impairments and the vocational factors of age, education, and work experience.

The disability progams established by Title II and XVI "are of a size and extent difficult to comprehend." *Richardson* v. *Perales*, 402 U.S. 389, 399 (1971). In fiscal year 1981 alone, approximately 2.3 million claims for disability benefits were filed under the two titles.[2] To provide for an orderly determination of the eligibility of this number of claimants, Congress and the Secretary have devised a four-level system of administrative consideration of disability claims.

Under the Title II program, with which this case is concerned, the determination whether a claimant is under a disability and the date on which the disability began or ceased is made by a state agency in the first instance. 42 U.S.C. 421(a); 20 C.F.R. 404.1503. By regulation, the Secretary has provided that if the claimant is dissatisfied with the initial eligibility determination, he may request a de novo reconsideration by the appropriate state agency. 20 C.F.R. 404.907-404.921 and 404.1615. In fiscal year 1981, more than 413,000 requests for reconsideration were processed.[3]

If the decision after reconsideration by the state agency is adverse to the claimant, he is entitled to a hearing by the Secretary in the same manner as provided in 42 U.S.C. (Supp. IV) 405(b) for all other claimants under the Old Age, Survivors and Disability Insurance (OASDI) Program. See 42 U.S.C. (Supp. IV) 421(c); 20 C.F.R. 404.929-404.961. Under 42 U.S.C. (Supp. IV) 405(b), the Secretary is required to provide "reasonable notice and opportunity for a hearing" with

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[2] Department of Health and Human Services, *Social Security Annual Report to the Congress for Fiscal Year 1981*, at 23, 26 (1982).

[3] Department of Health and Human Services, Office of Hearings and Appeals, *Key Workload Indicators* 15 (Oct. 1982).

respect to "decisions as to the rights of any individual applying for a payment" of benefits under Title II. If the claimant is dissatisfied with the decision rendered after the hearing, he may take an administrative appeal to the Appeals Council in HHS. 20 C.F.R. 404.967-404.983. After the individual has exhausted his administrative remedies in this fashion, he may seek judicial review of a final denial of benefits pursuant to 42 U.S.C. (Supp. IV) 405(g). See generally *Mathews* v. *Eldridge*, 424 U.S. 319, 335-339 (1976).[4]

The administrative hearings provided for in 42 U.S.C. (& Supp. IV) 405(b) are conducted by a corps of Administrative Law Judges (ALJs) in HHS. 20 C.F.R. 404.929. The total number of ALJ hearings requested annually under all Social Security programs increased from approximately 72,000 in fiscal year 1973 to more than 320,000 in fiscal year 1982.[5] The vast majority of these hearing requests are in disability cases.[6] The increase in the number of hearing requests is expected to continue in future years, in part because of a legislative requirement that the Secretary provide for a periodic review of the eligibility of individuals who are already receiving disability benefits—a process that predictably will result in an increase in the number of recipients whose benefits are terminated and who subsequently request reconsideration and an ALJ hearing. See Section 221(i) of the Act (42 U.S.C. (Supp. IV) 421 note),

[4] Similar procedures are followed in SSI disability cases under Title XVI of the Act. See 20 C.F.R. 416, Subpart N.

[5] *Key Workload Indicators*, note 3, *supra*, at 1.

[6] In fiscal year 1981, more than 250,000 of the 281,737 hearing requests were in disability cases. *1981 Annual Report*, note 2, *supra*, at 23, 26. In fiscal year 1980, more than 95% of all hearing requests involved Title II or Title XVI disability claims. Subcomm. on Social Security of the House Comm. on Ways and Means, 97th Cong., 1st Sess., *Social Security Hearings and Appeals: Pending Problems and Proposed Solutions*, 2 (Comm. Print 1981).

as added by Section 304(a) of the Social Security Disability Amendments of 1980, Pub. L. No. 96-265, 94 Stat. 457.[7]

To meet this greatly increased workload, the number of ALJs in HHS was increased from 420 in fiscal year 1973 to 813 in October 1982. The support staff per ALJ was more than doubled during this same period, and there is now an average of more than four support personnel for each ALJ. The result of these and other administrative initiatives has been to increase the average number of dispositions per ALJ each month from 14 in 1973 to 34 in 1982. Thus, today, on the average, an ALJ decides 1½ cases each working day.[8] During this same 10-year period, the average processing time from the date on which an evidentiary hearing was requested to the date on which the ALJ rendered his decision varied between a high of 288 days in fiscal year 1976, when *Mathews* v. *Eldridge* was decided (see 424 U.S. at 341-342), to a low of 151 days in 1979. In fiscal year 1982, the average processing time was 174 days, the same as it had been in 1973, thereby indicating that HHS now has been able to absorb the more than four-fold increase in its hearing caseload since 1973 without further extreme impact on the claimants' interest in receiving a hearing within a reasonable period.

Congress repeatedly has studied the problem of the backlog of disability cases arising from the increase in hearing requests (see pages 19-21, *infra*), but it has declined to impose deadlines for the holding of hearings or the rendering of decisions by the ALJs. For example, although Congress provided in 42 U.S.C. 1383(c)(2) that Title XVI claims generally are to be determined within 90 days of the request for a hearing, Congress expressly excepted disability cases from that deadline, apparently because of the complexity of the disability determination. In 1980, Congress directed the Secre-

[7] See Comm. Print, note 6, *supra*, at 1.

[8] *Key Workload Indicators*, *supra*, note 3, at 1.

tary to submit for its consideration a report "recommending the establishment of appropriate time limitations governing decisions on claims for benefits under title II of the Social Security Act," including a recommended time limitation for all four levels of administrative review. Pub. L. No. 96-265, Section 308, 94 Stat. 458. However, Congress took no action to impose such deadlines after receiving the Secretary's report (App. E, *infra*, 28a n.7).

Finally, in December 1982, when Congress did take affirmative action to reduce the impact of the time needed to adjudicate claims, it did so only in cases involving the cessation of the payment of disability benefits to individuals who previously had been found to be eligible. Congress required that the state agency furnish an opportunity for a face-to-face evidentiary hearing at the reconsideration stage in these termination cases in addition to the opportunity for an ALJ hearing at a later date. Congress further provided, on a one-year experimental basis, that the claimant in a termination case may elect to continue to receive benefits through the ALJ stage, subject to recoupment if he is found to have been ineligible. Pub. L.No. 97-455, Sections 2 and 4, 96 Stat. 2498, 2499. Congress did not provide, however, for a face-to-face hearing at the reconsideration stage in the case of new applications for benefits; nor did it authorize the payment of interim benefits pending the ALJ's decision following a hearing on a new application.

2. ***The Proceedings In This Case***

a. This class action was filed in the United States District Court for the District of Vermont on November 15, 1978, challenging the period of time that elapsed in Title II disability cases in Vermont between a request for reconsideration and the decision on reconsideration and between a request for a hearing and the convening of the hearing. Respondent Day, who had been receiving disability benefits, was initially found to

be no longer disabled in December 1977. He requested a reconsideration of this determination on December 21, 1977, and his claim was denied after reconsideration on June 6, 1978—167 days later. Day then requested an ALJ hearing. That hearing was held on December 4, 1978, soon after Day filed this action and 173 days after he had requested the hearing. On January 17, 1979, the ALJ issued a decision reaffirming the cessation of benefits (App. D, *infra*, 13a-14a). Respondent Maurais, who intervened in this suit on December 1, 1978, was notified in April 1978 that his disability had ceased. He requested reconsideration of that initial determination on June 2, 1978, and an adverse reconsideration decision was rendered on January 4, 1979—215 days after his request. Maurais then requested an ALJ hearing, and the hearing was held 65 days later (*id.* at 14a).

b. On December 28, 1978, the district court granted partial summary judgment for respondents with respect to the timing of ALJ hearings. Relying on the Second Circuit's prior decisions in *White* v. *Mathews*, 559 F.2d 852 (2d Cir. 1977), cert. denied, 435 U.S. 908 (1978), and *Barnett* v. *Califano*, 580 F.2d 28 (2d Cir. 1978), the district court held that the provision in 42 U.S.C. 405(b) for the Secretary to afford a claimant "reasonable notice and opportunity for a hearing" requires that the ALJ hearing be conducted within a "reasonable" time after it is requested (App. D, *infra*, 15a). In *White* v. *Mathews*, *supra*, a class action of Title II claimants in Connecticut, the court of appeals had held that the average period of 211.8 days between a request for a hearing and the decision following a hearing did not afford an opportunity for a hearing within a reasonable time and ordered the Secretary to reduce that time period for Connecticut claimants to 120 days. 559 F.2d at 858-860. In *Barnett* v. *Califano*, *supra*, the court of appeals had held that the period of 6 or 7 months that ordinarily elapsed between a hearing request and the hearing date for Title XVI disability

claimants in Vermont was unreasonable and ordered that this time be reduced to 90 days. 580 F.2d at 31-33.

The district court acknowledged that the Social Security Administration (SSA) "has made admirable strides in reducing the average length of delay experienced by claimants a few years ago" (App. D, *infra*, 17a). Nevertheless, on the basis of the holdings in *White* and *Barnett* and evidence in this case that 43% of Vermont residents who requested hearings on their Title II disability claims waited more than 90 days for their hearings, the court found that a substantial number of claimants had been denied their statutory right to a hearing within a reasonable time. Accordingly, the court ordered that ALJ hearings be held within 90 days of a request, subject to certain exceptions for delays attributable to the claimant (*id.* at 19a; App. F, *infra*, 33a-34a).[9]

c. On August 19, 1981, the district court granted summary judgment for respondents on the reconsideration aspect of the case as well. Although the Act does not require that there be a de novo reconsideration by a state agency or that any such reconsideration be held within a reasonable time, the court reasoned that reconsideration is an administrative prerequisite to an ALJ hearing and that delays in the reconsideration procedures trench on the statutory duty to provide a hearing within a reasonable time (App. E, *infra*, 27a). The court noted that for the years 1977-1980, reconsideration processing time ranged between 17 and 251 days in Vermont, with a mean processing time of 68 days, and that approximately 35% of the reconsideration requests took more than 90 days to process. The court recognized that it is often necessary to generate additional evidence on reconsideration, but held that a period of time for reconsideration in excess of 90 days is unrea-

[9] The district court previously had imposed a 90-day deadline for the convening of a hearing in Title XVI disability cases in Vermont. See *Barnett* v. *Califano*, 580 F.2d 28 (2d Cir. 1978).

sonable except in certain situations in which delay is attributable to the claimant (*id.* at 30a; App. F, *infra*, 33a).[10]

The district court also ordered the Secretary to pay interim disability benefits to any claimant who has not received a reconsideration determination or hearing within 180 days of the request for reconsideration or has not received a hearing within 90 days of his hearing request, even though the claimant has not yet been found by the State or the Secretary to be entitled to such benefits. These benefits were made subject to recoupment by the Secretary if the claimant later were found not to be eligible (App. E, *infra*, 30a-31a; App. F, *infra*, 34a-35a).

d. The court of appeals affirmed (App. A, *infra*, 1a-9a). The court of appeals expressed its "sympath[y] with the severe problems that beset SSA" and its "understand[ing] that [the district court's] decision may have a significant impact on its operations" (*id.* at 6a). But the court nevertheless concluded that judicially imposed timetables were appropriate for the processing of the "flood of claims" confronting SSA (*ibid.*, quoting *White* v. *Mathews*, *supra*, 559 F.2d at 859).

The court of appeals "share[d] the First Circuit's concern that 'if the Secretary's resources truly are inadequate to the task, the more litigious of the applicants may gain an advantage over the less assertive'" (App. A, *infra*, 7a, quoting *Caswell* v. *Califano*, 583 F.2d 9, 17 (1st Cir. 1978)). The court concluded, however, again quoting the *Caswell* decision, that it should not be deterred from awarding relief to the claimants before it by "'the alleged inability of the [Secretary] fully

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[10] Because the district court found violations of the Social Security Act, it did not reach respondents' arguments that the challenged practices violated the Due Process Clause of the Fifth Amendment or the Administrative Procedure Act (App. D, *infra*, 15a; App. E, *infra*, 26a). The court of appeals likewise did not consider those arguments (App. A, *infra*, 9a n.8).

to meet his obligations to others'" (*ibid.*). The court of appeals also recognized "that in the last five years Congress has involved itself heavily in the administration of the Act" and that "Congress has refused to impose its own deadlines," but the court viewed Congress' failure to enact clarifying legislation as perhaps implying that Congress is satisfied that the problem of delay is being handled effectively by the courts (App. A, *infra*, 7a). The court of appeals also approved the district court's extension of its holding in *White* to the reconsideration level (*id.* at 7a-8a).

In sustaining judicially imposed time limits, the court of appeals explicitly acknowledged (App. A, *infra*, 7a-8a) that its decision conflicted with *Wright* v. *Califano*, 587 F.2d 345 (1978), in which the Seventh Circuit held that the time between request and hearing did not warrant any judicial intervention, and was at odds with *Blankenship* v. *Secretary of HEW*, 587 F.2d 329, 335 (1978), in which the Sixth Circuit eschewed judicially imposed deadlines and instead ordered the Secretary to promulgate nationwide regulations to implement the reasonable time requirement. The Second Circuit nevertheless adhered to its prior precedent in *White*, *Barnett*, and *Sharpe* v. *Harris*, 621 F.2d 530 (1980) (App. A, *infra*, 6a-8a).

Finally, the court of appeals rejected the contention that the payment of interim benefits following the violation of judicially imposed deadlines is barred by 42 U.S.C. 405(i), which limits payments from the Disability Insurance Trust Fund to those made "[u]pon final decision of the Secretary or upon final judgment of any court of competent jurisdiction, that [the] person is entitled to any payment or payments" under Title II. In the court's view, this provision does not "'[e]xclude the possibility of interim payments ordered by a court exercising its remedial power" (App. A, *infra*, 8a, quoting *White* v. *Mathews*, *supra*, 559 F.2d at 861). The court of appeals did not believe that its earlier holding in

White, which awarded interim benefits in the absence of statutory authorization, was undermined by this Court's intervening decision in *Schweiker* v. *Hansen*, 450 U.S. 785 (1981). The court stated that the interim payments at issue here flow from the "district court's inherent powers to fashion a remedy," not from estoppel (App. A, *infra*, 8a-9a).

REASONS FOR GRANTING THE PETITION

This case directly concerns the most serious administrative problem confronting the Department of Health and Human Services today in its implementation of the Social Security Act: how to assure an accurate, fair, uniform and efficient determination of the entitlement to disability benefits of the several million individuals who apply for benefits or whose continuing eligibility is reviewed each year and the hundreds of thousands of such individuals who seek an evidentiary hearing before an Administrative Law Judge. The disability hearing system has been characterized as "probably the largest adjudicative agency in the western world,"[11] and it is to the Secretary of Health and Human Services, not to the courts, that Congress has entrusted its stewardship on a nationwide basis. 42 U.S.C. (& Supp. IV) 405(b). The ruling of the court of appeals is another in a line of decisions that have sanctioned an unwarranted and increasingly burdensome judicial intrusion into the ALJ hearing process through the imposition of fixed deadlines that Congress itself has declined to impose.

The necessary effect of these decisions will be to require the Secretary to divert scarce resources to the detriment of claimants in other geographic areas and in programs that are not yet subject to judicial decrees. Two other courts of appeals have rejected this ap-

[11] J. Mashaw, et al., *Social Security Hearings and Appeals: A Study of the Social Security Administration Hearing System* xi (1978).

proach, recognizing that the courts must defer to the Secretary in giving effect to the statutory requirement of "reasonable notice and opportunity for a hearing." Moreover, in the instant case, the court of appeals has for the first time extended the principle of judicially fashioned processing deadlines to the reconsideration stage, which is primarily the responsibility of the States, not the federal government.

The court of appeals also erred in ordering the payment of interim benefits when its judicially imposed deadlines are not met. This aspect of the decision is inconsistent with statutory provisions directing that funds may be paid out of the Trust Fund only if the recipient has been found eligible for benefits and with this Court's holding in *Schweiker* v. *Hansen*, 450 U.S. 785 (1981), that such statutory prerequisites to the disbursement of public funds must be honored by the courts. Review plainly is warranted to resolve these important and recurring questions.

1. a. Four courts of appeals have addressed the issue of the timing of ALJ disability hearings in the last several years, with four different results. The Second Circuit, in the instant case and in three preceding cases, held that the hearing times involved were unreasonable, imposed deadlines on the hearing process, and ordered the payment of interim benefits when those deadlines are not met.[12] The First Circuit, in *Caswell* v. *Califano*, *supra*, concurred in the appropriateness of judicially imposed time limits (583 F.2d at 15-18), but

[12] *White* v. *Mathews*, *supra*, 559 F.2d at 858-860; *Barnett* v. *Califano*, *supra*, 580 F.2d at 31-33; *Sharpe* v. *Harris*, *supra*, 621 F.2d at 531. See also *Martinez* v. *Califano*, Civ. No. 73-C-900 (E.D.N.Y. Jan. 3, 1978).

did not order the payment of interim benefits.[13]

The Sixth Circuit also held that the hearing delays were statutorily unreasonable. *Blankenship* v. *Secretary of HEW*, 587 F.2d 329, 333-334 (1978). However, the Sixth Circuit reversed the district court's order providing for judicially imposed deadlines, principally for three reasons: Congress had declined to impose fixed time limits; such an order in one State would require the shifting of resources from other States; and "[s]implistic and unreasonably short time limitations imposed from the outside without a thorough understanding of the reasons for the problem will frustrate welfare administration, just as it would frustrate judicial administration." *Id.* at 335. Instead, the Sixth Circuit ordered the Secretary to exercise his rulemaking authority under 42 U.S.C. 405(a) to formulate regulations giving substance to the statutory requirement of "reasonable notice and opportunity for a hearing."[14]

[13] However, a district court decision ordering the payment of interim benefits if judicially imposed time limits are not met is currently pending before the First Circuit on the Secretary's appeal. *Crosby* v. *Social Security Administration*, No. 81-675-T (D. Mass. Nov. 16, 1982), appeal pending, No. 83-1077.

[14] On remand in *Blankenship*, the Secretary attempted to develop acceptable regulations and submitted various regulatory proposals to the district court. In the end, however, the Secretary concluded that burgeoning and unpredictable caseloads made any commitment to fixed time limitations in regulations unworkable. The Secretary therefore moved for relief from the regulations requirement in favor of a commitment to establish processing goals. The district court denied the Secretary's motion, ordered him to publish regulations requiring a hearing decision within 180 days of request, and required the payment of interim benefits when the time limits are not satisfied. In a companion case decided the same day, *Finch* v. *Schweiker*, No. Civ. Nos. C 75-0185 L(A), C 76-0441 L(A) (W.D. Ky. Feb. 17, 1982), the district court imposed time limits on yet another stage of the administrative process—decisions by the Appeals Council. *Blankenship* v. *Secretary of Health & Human Serv-*

The Seventh Circuit, in *Wright* v. *Califano*, 587 F.2d 345, 354 (1978), on the other hand, concluded that no judicial intervention whatever in the hearing delay problem was warranted. The Seventh Circuit expressly refused (*ibid.*) to follow *White*, *Barnett*, and *Caswell*, the decisions upon which the court below relied in the instant case (App. A, *infra*, 5a-8a).[15] In the Seventh Circuit's view, a court ordinarily is not competent to evaluate the efficiency of an administrative agency and to make the essentially legislative judgment whether the agency is performing its work with reasonable dispatch. 587 F.2d at 352-353. The Seventh Circuit observed that Congress had committed the timing of hearings to the discretion of the Social Security Administration and, unlike the court below, found it significant that Congress, despite careful monitoring, had failed to prescribe mandatory time limits on that process or to direct the payment of interim benefits. *Id.* at 353. The Seventh Circuit further explained that since the hearing delays complained of were systemwide—and there were no allegations of bad faith, dilatory attitude, or lack of evenhandedness—whether the agency acted reasonably should be judged in light of the resources Congress supplied and the impact of the delay. In these circumstances, the Seventh Circuit concluded, a court should be reluctant to intervene absent "clear congressional guidelines." In *Wright* itself, "given the good faith efforts of the SSA to cope with the delay problem under severe resource constraints and the prospect of

ices, 532 F. Supp. 739, 746-747 (W.D. Ky. 1982). The Sixth Circuit granted a stay of the orders in *Blankenship* and *Finch* pending the Secretary's appeal. The appeal was argued on October 8, 1982, but no decision has yet been rendered. *Blankenship* v. *Schweiker*, Nos. 82-5130, 82-5204.

[15] *Wright* v. *Califano* involved applicants for old age and survivors benefits, not disability benefits, but this distinction did not play a role in the Seventh Circuit's legal analysis.

future progress," the court could not find that the time spent in processing hearing requests was so unreasonable as to warrant judicial intervention. 587 F.2d at 353-354.

Thus, the courts of appeals are in conflict on the propriety of judicial intervention in the HHS disability hearing process and the payment of mandatory interim benefits. The divergence in the lower courts can only be expected to increase in the future, in view of the pendency of at least 13 more class actions challenging delays in the administrative claims procedures.[16]

b. This conflict among the lower courts has substantial practical consequences. The courts of appeals that have considered the matter uniformly have recognized that the Secretary has made significant efforts to manage a caseload that has quadrupled in size over the past decade; and no court has suggested the existence of bad faith or dilatory motive on the part of HHS. See, *e.g.*, *Blankenship* v. *Secretary of HEW*, *supra*, 587 F.2d at 334; *Wright* v. *Califano*, *supra*, 587 F.2d at 352-354; *Caswell* v. *Califano*, *supra*, 583 F.2d at 17-18; *Barnett* v. *Califano*, *supra*, 580 F.2d at 32; *White* v. *Mathews*, *supra*, 559 F. 2d at 861. The district court in this case likewise noted that the Secretary had made "admirable strides" in reducing the waiting period from what it had

[16] In addition to those cited in notes 13 and 14, *supra*, other pending cases include: *Cockrum* v. *Califano*, 475 F. Supp. 1222 (D.D.C. 1979), vacated and remanded, 634 F.2d 1358 (D.C. Cir. 1980), pending on remand, Civ. 78-1147 (D.D.C.); *Cortez* v. *Califano*, Civ. No. B-79-517 (D. Conn.); *Dixon* v. *Miller*, Civ. No. 77-C-1125 (N.D. Ill.); *Fuentes* v. *Harris*, Civ., No. SA-81-CA-398 (W.D. Tex.); *Holman* v. *Harris*, Civ. Action No. 78-494 (M.D. Pa.); *Lopez* v. *Harris*, Civ. No. 81-121 (D. Conn.); *Maloney* v. *Califano*, Civ. No. 77-644 (D.N.M.); *Matheny* v. *Califano*, Civ. No. C-78-132 (E.D. Wash.); *Quintana* v. *Califano*, Civ. No. 78-397 (D.N.M.); *White* v. *Schweiker*, Civ. No. 81-4023 (E.D. N.Y.); *Williams* v. *Schweiker*, Civ. No. 81-1070-C (II) (E.D. Mo.).

been several years earlier (App. D, *infra*, 17a). But despite those efforts, the nationwide *median* case processing time at the hearing stage is currently between 170 and 180 days (see page 5, *supra*). It is therefore clear that the Secretary could not satisfy the 90-day deadline for the holding of hearings imposed in this case or comparable deadlines imposed in other cases if those deadlines were extended nationwide. The only way that such deadlines can be met in the District of Vermont or in other districts where court-imposed deadlines are in effect is for the Secretary to divert scarce resources from other geographic areas and other programs that are not yet subject to such judicial decrees. This would, of course, work to the detriment of claimants who are awaiting hearings in those areas and programs.[17] Such a regime undermines the agency's obligation of even-handed treatment, which is an important element of the guarantee of an opportunity for a hearing within a "reasonable" time. *Wright* v. *Califano*, *supra*, 587 F.2d at 352-353; *FTC* v. *J. Weingarten, Inc.*, 336 F.2d 687, 691-692 (5th Cir. 1964); Goldman, *Administrative Delay and Judicial Relief*, 66 Mich. L. Rev. 1443, 1425 (1968).

It was precisely this prospect of uneven treatment of claimants in different States that led the Sixth Circuit in *Blankenship* to overturn the hearing deadlines imposed by the district court for Kentucky claimants. 587

[17] We have been informed by HHS, for example, that between January 1980 and September 1981, in order to comply with judicially imposed deadlines in the *Sharpe* and *Martinez* decisions in New York (see note 12, *supra*), it was necessary for HHS to transfer more than 5000 cases to ALJs outside of the administrative region and more than 1400 cases to ALJs in other States within that region. Similarly, we have been informed that in order for HHS to comply with the district court's order in *Crosby* (see note 13, *supra*), it has been necessary to transfer all new cases to ALJs outside of Massachusetts while ALJs in that State reduce their backlog.

F.2d at 335. Even the Second Circuit in the instant case and the First Circuit in *Caswell* expressed their concern that if the Secretary's resources are inadequate, litigious applicants in one State will attain an advantage over less assertive claimants in other States (App. A, *infra*, 7a; 583 F.2d at 17). But they proceeded to ignore this concern by nevertheless imposing hearing deadlines of far shorter duration than the national average.

Moreover, there is no uniformity even among those courts which have concluded that judicial intervention is appropriate. The processing time allowed from hearing request to decision varies between 120 days[18] and 180 days,[19] while in other cases, as in the decision below, the relevant deadline is for the holding of the hearing by the ALJ, not his rendering of a decision.[20] These various deadlines are subject to exceptions that in turn vary from district to district, and the reporting and other compliance features of the decrees also differ. The result is to produce disparity even as among the claimants sought to be benefited by the respective decrees and to introduce complex administrative burdens for HHS in seeking to comply with them.[21] The efficient nationwide administration of the Titles II and XVI disability programs cannot tolerate this increasing balkanization.

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[18] *White* v. *Mathews*, *supra*, 559 F.2d at 855; *Sharpe* v. *Harris*, *supra*, 621 F.2d at 531.

[19] *Blankenship* v. *Secretary of Health & Human Services*, *supra*, 532 F. Supp. at 746; *Crosby* v. *Schweiker*, note 13, *supra*.

[20] App. A, *infra*, 5a; *Caswell* v. *Califano*, *supra*, 583 F.2d at 11; *Barnett* v. *Califano*, *supra*, 580 F.2d at 33.

[21] We have been informed by HHS, for example, that differing court orders in *Sharpe*, *Martinez*, and other cases in New York (see note 12, *supra*) have necessitated the establishment of three different administrative systems in that State alone to track the processing of hearing requests.

Review by this Court therefore is necessary to resolve the conflict among the circuits and district courts on the legal issues presented and the appropriate contours of relief, as well as to eliminate the practical disparity among different classes of claimants that has been generated by this and other decisions.[22]

2. a. The court of appeals plainly erred in concluding that the processing time for hearing requests in Vermont was not "reasonable" for purposes of 42 U.S.C. (Supp. IV) 405(b) and that a judicially imposed deadline of 90 days was appropriate. When Congress has desired a fixed deadline for the conduct of ALJ hearings, it has expressly so provided in the Social Security Act itself. For example, Congress has specified that determination of entitlement to SSI benefits should be made within 90 days of the request for a hearing. 42 U.S.C. 1383(c)(2). Prompt action on claims for SSI benefits is of greater importance because entitlement to such benefits, unlike those provided under Title II of the Act, is based on need. 42 U.S.C. 1382(a); compare *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 340-341. Even in the case of SSI benefits, however, Congress excluded disability cases from the 90-day requirement, presumably because of the greater complexity of the determination of disability as compared with other questions involved in SSI cases.

In its decision in *White* v. *Mathews*, *supra*, followed in this case, the Second Circuit relied in imposing time

[22] The Court denied the Secretary's certiorari petition in 1978 seeking review of the judgment of the Second Circuit in *White* v. *Mathews*, 435 U.S. 908. *White*, however, was the first court of appeals' decision presenting these questions. There accordingly was no conflict among the circuits at that time, and the practical consequences might have appeared to the Court to be uncertain. There is now a clear conflict among the circuits, and the adverse consequences of the proliferation of such decisions are manifest, especially since the nationwide caseload continues to increase.

limitations on the language in 42 U.S.C. (Supp. IV) 405(b) that requires the Secretary to provide "reasonable notice and opportunity for a hearing." See 559 F.2d at 858. We agree that timing is one aspect of the requirement that the opportunity for a hearing be "reasonable," but other considerations are relevant as well.

As early as 1975, a congressional report observed that "although mandating by statute certain processing time limits might seem on the surface a desirable thing to do, such legislation might also have an adverse effect on the quality and uniformity of disability adjudication which is already somewhat suspect."[23] Similarly, in 1980, when Congress by statute required the Secretary to submit a report recommending the establishment of time limitations, the statute itself directed the Secretary to take into account "both the need for expeditious processing of claims for benefits and the need to assure that all such claims will be thoroughly considered and accurately determined." Pub. L. No. 96-265, Section 308, 94 Stat. 458. See also *Little* v. *Streater*, 452 U.S. 1, 13-14 (1981); *Lassiter* v. *Department of Social Services*, 452 U.S. 18, 27-28 (1981). The important interest in assuring uniform, thorough, and accurate decisions would not be served if fixed deadlines do not allow a sufficient time for a reasoned adjudication of individual cases or the caseload generally. The court of appeals failed to explore these countervailing considerations that Congress itself declared to be relevant in this very context.

Moreover, even on the question of timing, the individual claimant's interest is only one of the relevant factors, just as it is under the three-part due process test of *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 335. It is

[23] See Report of the Staff of the House Subcomm. on Social Security of the House Comm. on Ways and Means, 94th Cong., 1st Sess., *Appeals Process: Areas of Possible Administrative or Legislative Actions*, 1-2 (Comm. Print 1975).

necessary as well under *Mathews* v. *Eldridge* to consider "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail" (*ibid.*). So here, the court of appeals was required to consider the resource limitations and administrative burdens confronting HHS in determining the reasonableness of the timing of the reconsideration and hearing process and the appropriateness of court-ordered deadlines. Note, *Judicial Resolution of Systemic Delays in Social Security Hearings*, 79 Colum. L. Rev. 959, 977 (1979). Cf. *Open America* v. *Watergate Special Prosecution Force*, 547 F.2d 605, 614-616 & n.17 (D.C. Cir. 1976). The court below erred in myopically considering only respondents' individual concerns.

b. The numerous and competing factors that must be taken into account in effectuating the statutory requirement of a "reasonable * * * opportunity for a hearing" under programs as vast as Titles II and XVI of the Social Security Act underscore that the problem inherently is one for administrative or legislative—not judicial—resolution. Indeed, at various times, both Congress and the Secretary have adopted measures to improve the adjudication process. In 1976, for example, Congress addressed the backlog problem by permitting the use of non-ALJ hearing officers to consider disability cases. Pub. L. No. 94-202, Section 3, 89 Stat. 1135. In 1978, the Secretary, in order to ensure uniform and efficient determinations of disability, adopted the medical-vocational guidelines at issue in *Schweiker* v. *Campbell*, No. 81-1983.

Similarly, in 1982, Congress afforded the Secretary flexibility in selecting cases for periodic review in order to enable him to accommodate the backlog of new applications and state staffing levels. Pub. L. No. 97-455, Section 3, 96 Stat. 2499. Congress also provided for

face-to-face hearings by state agencies at the reconsideration stage and the payment of interim benefits through the ALJ stage in disability benefit termination cases, in recognition of the backlog in the ALJ hearing process and the special equities involved when a person is currently receiving and perhaps dependent upon his benefits. Pub. L. No. 97-455, Sections 2 and 4, 96 Stat. 2498, 2499. See 128 Cong. Rec. S15963 (daily ed. Dec. 21, 1982) (remarks of Sen. Armstrong); *id.* at S15964 (remarks of Sens. Dole and Levin); *id.* at 15965 (remarks of Sen. Cohen). Thus, Congress was aware of the impact of delays in the ALJ hearing process and adopted what it determined to be appropriate remedies. It did not, however, choose to impose deadlines on the ALJ hearing process or provide for any additional procedures or the payment of interim benefits in the case of new applicants, as the decision of the court of appeals would do.

"[T]his Court has been willing to assume a congressional solicitude for fair procedure" (*Califano* v. *Yamasaki*, 442 U.S. 682, 693 (1979)). It also has admonished that "substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals" (*Mathews* v. *Eldridge*, *supra*, 424 U.S. at 349). As noted above, no court has suggested that the delays experienced in determining disability claims are the product of bad faith or dilatory motive on the part of HHS. See page 15, *supra*. Accordingly, and in view of the continuing oversight of the process by Congress and the Secretary, there was no basis for the courts below to "engraft[] their own notions of proper procedures upon agencies entrusted with substantive functions by Congress." *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 525 (1978).

3. Finally, the court of appeals acted without legal authority in ordering the payment of interim benefits as a remedy for the violation of judicially imposed time limits. This Court has emphasized repeatedly that a court may not order monetary relief against the federal government absent a congressional enactment waiving the United States' sovereign immunity. See, *e.g.*, *Army & Air Force Exchange Service* v. *Sheehan*, No. 80-1437 (June 1, 1982); *United States* v. *Testan*, 424 U.S. 392 (1976); *Pine Hill Coal Co.* v. *United States*, 259 U.S. 191, 196 (1922); cf. United States Constitution, Article I, Section 9, Clause 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law * * *").

There is no such statutory authority for the interim payment of disability benefits on the ground of delay. To the contrary, the Social Security Act allows the payment of benefits only upon a "final decision of the Secretary or upon final judgment of any court of competent jurisdiction" that a person is "entitled to payment" (42 U.S.C. 405(i)). In order to be "entitled" to disability benefits, a person must be, *inter alia*, "under a disability" (42 U.S.C. (& Supp. IV) 423(a)(1)). Until the Secretary or a court has found that the claimant is disabled and satisfies the other eligibility criteria, the statute does not authorize payment.[24] It also is significant that when Congress has wished to provide for interim benefits, it has enacted a statute, as it did last year. See page 21, *supra*. The absence of such authorization in other settings reinforces the conclusion that such pay-

[24] Although the district court's order permits the interim benefits to be recouped if the claimant is later found to be ineligible (App. F, *infra*, 35a), this "theoretical right of the Secretary to recover undeserved benefits [would not] result, as a practical matter, in any substantial offset to the added outlay of public funds." *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 347.

ments are barred. *Lehman* v. *Nakshian*, 453 U.S. 156, 162-163 (1981).

Just two terms ago, in a Social Security case, this Court reiterated "'the duty of all courts to observe the conditions defined by Congress for charging the public treasury.'" *Schweiker* v. *Hansen*, *supra*, 450 U.S. at 788, quoting *Federal Crop Insurance Co.* v. *Merrill*, 332 U.S. 380 (1947). The court of appeals in the instant case refused to heed this duty. It sought to avoid the force of *Hansen* by characterizing the interim benefit requirement as flowing from the "district court's inherent powers to fashion a remedy" (App. A, *infra*, 8a). But the courts of the United States have no "inherent power" to order the payment of money from the federal Treasury whenever they find a violation of a statute. *United States* v. *Testan*, *supra*, 424 U.S. at 401, 403. Moreover, the remedy a court may fashion for a violation of 42 U.S.C. (Supp. IV) 405(b) surely is limited by the conditions on the payment of money from the Trust Fund contained in Subsection (i) of that same statutory provision. Compliance with those conditions is not excused by mere delay in processing a claim. Cf. *INS* v. *Miranda*, No. 82-29 (Nov. 8, 1982). The decision of the court of appeals directing the payment of interim benefits therefore should not be permitted to stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1195 August Term 1981

Argued June 9, 1982 Decided June 28, 1982

Docket No. 82-6009

Filed June 28, 1982

LEON S. DAY, ET AL., PLAINTIFF-APPELLEE,

v.

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT-APPELLANT.

Before: FEINBERG, Chief Judge, CARDAMONE, Circuit Judge and SAND, District Judge.*

PER CURIAM:

The Secretary of Health and Human Services appeals from various orders of the United States District Court for the District of Vermont, James S. Holden, Ch. J., granting summary judgment in favor of a class of claimants[1] seeking disability benefits under Title II of the Social Security Act (the Act), 42 U.S.C. § 401 et seq.

*United States District Judge for the Southern District of New York, sitting by designation.

[1] The class was certified on June 14, 1979 as:

> All present and future Vermont residents seeking to secure social security disability benefits who, following an initial determination by the defendants that no disability exists, experience an unreasonable delay in a scheduling of and/or issuance of decisions in reconsiderations and their hearings.

We find that most of the arguments raised in this appeal are almost indistinguishable from those decided by us in earlier cases, see *Sharpe* v. *Harris*, 621 F.2d 530 (2d Cir. 1980); *Barnett* v. *Califano*, 580 F.2d 28 (2d Cir. 1978); *White* v. *Mathews*, 559 F.2d 852 (2d Cir. 1977), cert. denied, 435 U.S. 908 (1978), and that, in any event, our prior decisions are controlling. Accordingly, we affirm the judgment of the district court.

I.

The procedure for challenging an initial determination that a Vermont claimant is ineligible for Title II disability benefits is set out in the Act and regulations adopted thereunder, and is explained in greater detail in the district court's opinions dated December 28, 1979 and August 19, 1981. The claimant's first step is to request reconsideration of his claim at the District Office (DO) of the Social Security Administration (SSA). That office locates the claimant's folder (which, the district court found, is not always easy) and forwards it to the appropriate Disability Determination Agency (DDA). The claim is then subjected to de novo review, which often entails updating the file with new evidence gathered at the claimant's initiative or pursuant to a request of the DDA. When the DDA completes its reconsideration, the claim follows one of several routes. A case involving a "new" claimant (one who had not been previously receiving benefits) is rerouted to the DO and a reconsideration notice is sent to the claimant by the DDA either by computer or manually. The DDA may, however, delay sending notice while it undertakes a "quality assurance review" of its own, or sends the case to the Office of Disability Operations (ODO) in Baltimore, Maryland for a quality control review. A case involving cessation of payments to an "old" claimant (one who was previously receiving benefits) is always sent to ODO for a final review before notice of denial is sent to the claimant. In either case, once a claimant re-

ceives notice of an adverse determination or reconsideration, he is entitled to a fair hearing before an administrative law judge. The claimant is not, however, entitled to resort to federal court to reverse a denial of benefits until he has run the full gauntlet of administrative review.

In the district court, appellees claimed that two kinds of delay violated their constitutional rights under the due process clause of the fifth amendment and their statutory rights under the Administrative Procedure Act, 5 U.S.C. § 555(b)[2] and the Social Security Act, 42 U.S.C. § 405(b).[3] First, they maintained that SSA took an unreasonable amount of time to dispose of a claim once a claimant had made a request for reconsideration.[4] Second, they claimed that the time between a re-

[2] Section 555(b) provides in pertinent part that:

> With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to include all matters presented to it.

[3] Section 405(b) provides in pertinent part that:

> Upon request by any such individual or upon request by a wife, divorced wife, widow, surviving divorced wife, surviving divorced mother, husband, widower, child, or parent who makes a showing in writing that his or her rights may be prejudiced by any decision the Secretary has rendered, he shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse his findings of fact and such decision.

In *White*, we interpreted "reasonable notice and opportunity for a hearing" as a right to a hearing within a reasonable time, 559 F.2d at 858, and the Secretary does not challenge this interpretation.

[4] In named-plaintiff Day's case, the district court found that this delay amounted to 167 days; in plaintiff Maurais's case, it was found to be 215 days. Furthermore, the district court found these delays to be within the normal range of delays experienced by Vermont SSA claimants.

quest for a hearing and the date of hearing was unreasonably lengthy.[5] In his December 1979 opinion, Chief Judge Holden granted summary judgment in favor of appellees on the latter issue, finding that the unreasonable delay in scheduling hearings contravened the Social Security Act. In his August 1981 opinion, after considerable additional briefing, the judge came to the same conclusion on the reconsideration issue. He evaluated the delay there by the same standard used on the hearing issue because he reasoned that since "[t]he time necessary to complete a reconsideration is included in the time that the claimant must wait before he is afforded a hearing . . . [u]nreasonable delays in the reconsideration procedures trench on the statutory duty to provide a hearing within a reasonable time."

Relying on our decisions in *Barnett* and *White*, Judge Holden next turned to fashioning relief for appellees' class. In a judgment entered in November 1981, the district court ordered that with certain significant exceptions,[6] reconsideration processing must be completed within 90 days of a request for reconsideration,

[5] The district court found that in this regard Day experienced a 173-day delay and Maurais, a 65-day delay. Neither delay was found by the district court to be out of the normal range.

[6] The district court excepted delays resulting from the following circumstances:

(a) The claimant offers new medical evidence or reports new medical treatment since his initial determination;

(b) the claimant agrees to undergo a consultative examination when one is suggested by the defendant;

(c) The claimant or his representative causes a delay by failing to provide information needed for reconsideration;

(d) The claimant or his representative requests a delay; or

(e) The delay is in some other way attributable to the aggrieved claimant or his representative.

and that with similar exceptions,[7] a hearing must be scheduled within 90 days of a request for hearing. Judge Holden then went on to order that interim disability payments be made, subject to the exceptions described above and to recoupment if the claimant is later found to be ineligible for disability payments, whenever no reconsideration determination is issued within 180 days of the request for reconsideration, whenever no hearing is held within 180 days of a prior request for reconsideration that is followed by a hearing request and whenever no hearing is held within 90 days of a request for a hearing.

II

On appeal, the Secretary raises several arguments that are similar to those made in our earlier cases. First, he claims that the case is nonjusticiable because Congress has entrusted the administration of the act to the Department of Health and Human Services. It is true that this argument, strengthened somewhat by the Seventh Circuit's reading of the decision in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), won the day for the Secretary in *Wright* v. *Califano*, 587 F.2d 345, 352-54 & 356 (7th Cir. 1978). But see *Smith* v. *Miller*, 665 F.2d 172 (7th Cir. 1981). A similar claim also gained him a partial victory in *Blankenship* v. *Secretary of HEW*, 587 F.2d 329, 335 (6th Cir. 1978). We,

[7] The district court excepted delays resulting from the following circumstances:

(a) The claimant or his representative causes a delay by failing to provide information needed for adjudication;

(b) The claimant or his representative requests a delay;

(c) The claimant or his representative fails to appear for the scheduled hearing;

(d) The delay is in some other way attributable to the claimant or his representative.

however, agree with the First Circuit's view that "while ... Congress must bear the ultimate responsibility for remedying problems in the administration of federal programs ... *cf. Vermont Yankee* ..., that does not mean that a judicial role is precluded where the statutory mandate is not being followed." *Caswell* v. *Califano*, 583 F.2d 9, 16 (1st Cir. 1978). This is particularly true when "the danger of judicial intervention is outweighed by the irreparable harm suffered by members of the plaintiff class who encounter unreasonable delays in gaining consideration of their applications." *Sharpe*, 621 F.2d at 531. See also *White*, 559 F.2d at 858-59.

Next, the Secretary argues that our previous decisions should not be followed because the increase in caseload and congressional "assumption of oversight" show that circumstances have changed significantly since the earlier cases were decided. As to the former argument, the increment in SSA's caseload is a variant of the claim made in *White* that the Secretary is precluded from adhering to a judicially mandated timetable by the "flood of claims," 559 F.2d at 859. As before, we sympathize with the severe problems that beset SSA, and we understand that Judge Holden's decision may have a significant impact on its operations. But the new statistics presented to us on this appeal do not persuade us to revise the position we took in *White:*

> Although what is reasonable depends upon a variety of circumstances, [the] statutory command should not be ignored. The disability insurance program is designed to alleviate the immediate and often severe hardships that result from a wage-earner's disability. In that context, delays of the better part of a year in merely affording an evidentiary hearing detract seriously from the effectiveness of the program. Perhaps this unfortunate impact might be diminished to a tolerable level if a high percentage of claimants seeking hearings be-

> fore an administrative law judge were not actually entitled to benefits. But such hearings have led to reversals in more than half the cases heard. (Citation omitted.)

559 F.2d at 858. We also share the First Circuit's concern that "if the Secretary's resources truly are inadequate to the task, the more litigious of the applicants may gain an advantage over the less assertive." *Caswell*, 583 F.2d at 17. But we also agree with the First Circuit's conclusion:

> However, the vindication of almost every legal right has an impact on the allocation of scarce resources. And the courts, while mindful of the impact of remedies upon persons not before them, can hardly permit the legal rights of litigants to turn upon the alleged inability of the defendant fully to meet his obligations to others.

Id.

The Secretary's claim based on alleged congressional oversight is equally unpersuasive. While it is true that in the last five years Congress has involved itself heavily in the administration of this Act, it was also carefully examining the situation at the time of *White* and *Barnett*, see 559 F.2d at 859; 580 F.2d at 31. Moreover, evidence that Congress has refused to impose its own deadlines cuts both ways. Inactivity in the face of decisions imposing deadlines can also imply that Congress is satisfied that unjustifiable delay is being handled effectively by the courts. In any case, we feel that so long as Congress has not enacted clarifying legislation or removed the term "reasonable" from the statute, our duty is to vindicate plaintiffs' interest as we see it.

The Secretary's final points are new. First, he claims that the court below erred in extending the doctrine of *White* and *Barnett* to delays in reconsideration because this level of administrative review is entirely a creature of the Secretary's discretion, and was adopted in response to Congress' concern for accurate determina-

tions of entitlement to disability insurance. We disagree. Judge Holden was correct in finding that the only meaningful way to encourage prompt adjudication is to adopt a single remedial scheme incorporating all stages of review. Furthermore, the relief ordered was crafted with an eye towards the Secretary's concerns. Thus, the judge excepted from his order delay caused by the need to garner the fresh information required to assure accurate results.

Finally, the Secretary claims that imposition of interim payments is impermissible under 42 U.S.C. § 405(i), which limits payments to those who have been certified by the Secretary "[u]pon final decision of the Secretary or upon final judgment of any court of competent jurisdiction, that [the] person is entitled to any payment or payments...." This contention has been rejected before, see *White*, 559 F.2d at 861 (finding that § 405(i) is directed at "the ordinary situation in which payments become due after favorable administrative adjudication, or judicial review," and does not "exclude[e] the possibility of interim payments ordered by a court exercising its remedial power"); *Barnett*, 580 F.2d at 33. Nonetheless, the Secretary now claims that the recent decision in *Schweiker* v. *Hansen*, 450 U.S. 785 (1981), gives his contention new force. We believe, however, that *Hansen* is distinguishable. In that case, social security claimant Hansen argued that the Secretary should be estopped from denying her benefits, for which she did not apply, because her failure to file a written application was due to misinformation given her by his representative. Our case involves neither estoppel nor a deficiency on the part of the claimant. All the claimants who have been accorded relief by the order below have, by definition, complied with the procedural requirements of the Act. Moreover, the interim payments at issue here flow from the district court's inherent powers to fashion a remedy, see *Caswell*, 583 F.2d at 17,

and cases there cited, and not from an estoppel that prevents the government from raising a defense.

We have carefully reviewed all the arguments raised by the Secretary and find them without merit.[8] For the reasons stated above, we adhere to our belief that our prior decisions were correctly decided, and we therefore affirm the judgment of the district court.

[8] Because we affirm on the ground that the delay violated appellees' statutory rights under 42 U.S.C. § 405(b), note 3 supra, we do not reach their contentions under the due process clause or the Administrative Procedure Act.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 82-6009

Filed June 28, 1982

LEON S. DAY, ET AL., PLAINTIFF-APPELLEE,

v.

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT-APPELLANT.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of June one thousand nine hundred and eighty-two.

Present: HON. WILFRED FEINBERG, Ch.J., HON. RICHARD J. CARDAMONE, C.J., HON. LEONARD SAND, D.J.

Appeal from the United States District Court for the District of Vermont.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Vermont, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of the said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk

By ARTHUR HELLER
ARTHUR HELLER
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 82-6009

Filed Sep. 17, 1982

LEON S. DAY, ET AL., PLAINTIFF-APPELLEE,

v.

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT-APPELLANT.

At a stated term of the United States Court of Appeals, in and for the Second Circuit, at the United States Courthouse, in the City of New York, on the seventeenth day of September, one thousand nine hundred and eighty-two.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, Richard S. Schweiker, Secretary of Health and Human Services,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. DANIEL FUSARO,
Clerk

By FRANCIS X. GINDHART
FRANCIS X. GINDHART
Chief Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Civil Action File No. 78-266

Filed Dec. 31, 1979

LEON S. DAY AND AMEDIE MAURAIS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS

v.

PATRICIA ROBERTS HARRIS, SECRETARY, UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, DEFENDANT

OPINION AND ORDER

This case is presently before the court on motions by both parties for summary judgment. Oral and written arugments made by both parties in support of their respective positions have been considered. For the reasons stated below, partial summary judgment is granted for plaintiffs.

I. FACTS

Plaintiffs allege that the extensive delays experienced by them and the class which they represent[1] in the processing of appeals from denials of Title II Social Security benefits violate their statutory rights to a

[1] By order, dated June 14, 1979, this court certified the class as consisting of:

> All present and future Vermont residents seeking to secure Social Security disability benefits who, following an initial determination by the defendant that no disability exists, experience an unreasonable delay in the scheduling of and/or issuance of decisions in reconsiderations and fair hearings.

hearing within a "reasonable time" and their constitutional right to due process.

Before examining the facts of this case, it is appropriate to outline the administrative procedure made available by the Social Security Administration (SSA) to a claimant for obtaining review of a decision denying benefits.

Once the SSA has made an initial determination that a claimant is not entitled to Title II disability benefits or that a recipient of such benefits is no longer entitled to them because his disability has terminated, the claimant may request reconsideration with the local Social Security District Office. The District Office then forwards the claimant's file to Vermont Disability Determination Services (DDS) where medical evidence is reviewed and a decision reached. Notice of the decision is sent to the claimant from DDS. Until October 1978, 10% of all initial denials and all of the cessation denials were forwarded to the Bureau of Disability Insurance (BDI) in Baltimore, Maryland, for review and eventual notification to the claimants. Since October 1978, BDI no longer reviews cessation denials. However, the files continue to be forwarded to BDI to enable that office to prepare and transmit notification to the claimants.

If a claimant receives an adverse reconsideration decision, he is then entitled to a fair hearing before an administrative law judge (ALJ). After the District Office receives this request, it is forwarded to the Hearing Office in Manchester, New Hampshire. The claim is then assigned to an ALJ. Following pre-hearing preparation, the case is scheduled for a hearing and the claimant is so notified.

It appears in the record in this case that in December 1977 the SSA determined that plaintiff Day was no longer disabled and, thus, no longer eligible for disability benefits. Although plaintiff Day requested a reconsideration of this determination on December 21, 1977,

he did not receive a determination until June 6, 1978, 167 days later. Since the determination was adverse, plaintiff made a request on June 14 for a hearing. A hearing had not yet been scheduled in November when Day filed this action for injunctive and declaratory relief. Subsequently, a hearing was held on December 4, 1978, 173 days after it was initially requested. The ALJ issued a decision on January 17, 1979 reaffirming the cessation of benefits.

Plaintiff Amedie Maurais intervened in this action on December 1, 1978, after almost six months had passed without any decision regarding his request for reconsideration. In April 1978, he was notified by the SSA that his disability had ceased in November of the previous year and that since that time he had been overpaid more than $2,000 in benefits. On June 2, 1978 he requested reconsideration and waiver of recoupment. After Mr. Maurais filed his motion to intervene, an adverse reconsideration decision was issued on January 4, 1979, 215 days after it was requested. On January 23, claimant wrote to the SSA requesting a hearing which was held 65 days later on March 29, 1979. As a result of that hearing, plaintiff Maurais' benefits were reinstated.

The defendant Secretary submitted evidence concerning the delays experienced by other Vermonters seeking relief from denials or cessation of disability benefits by the SSA. The evidence submitted by the government is not disputed by the plaintiffs and shows a widely varying range of delays. Of the cases processed by DDS during the four month period of September through December 1978, the delays in reconsideration ranged from one to 340 days. During the period January to November 1978, the DDS mean processing time per case was 30.5 days, with the mean ranging between 16.7 to 51.7 days per case. Claimants whose

cases are forwarded to BDI in Baltimore for additional processing incur additional unspecified delays.

Statistics concerning delays between request for hearing and hearing indicate that 57% of the hearings requested after January 1978 were scheduled within 90 days, with a range of delays varying between two and nine months.

II. LAW

Plaintiffs contend that the delays they have experienced in obtaining reconsideration decisions, fair hearings and hearing decisions are so lengthy as to be "unreasonable" and contrary to provisions of the Social Security Act and the Administrative Procedure Act. They maintain the excessive delays violate their rights to due process of law guaranteed by the Fifth Amendment. We consider first the legality of the delays experienced in obtaining a hearing after it is requested. Since it appears that the defendant's present policies are in violation of the Social Security Act, it is not necessary to reach the other statutory and constitutional claims.

The Social Security Act provides in pertinent part:

> The Secretary is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Upon request by any such individual ... (the Secretary) shall give such applicant ... *reasonable* notice and opportunity for a hearing with respect to such decision.

42 U.S.C. § 405(b) (emphasis supplied).

In support of their position, plaintiffs rely upon the decision by this court in *Barnett* v. *Califano*, Civ. No. 74-210 (D. Vt. 1977) (Coffrin, J.), *aff'd* 580 F.2d 28 (2d Cir. 1978) and *White* v. *Mathews*, 434 F.Supp. 1252 (D. Conn. 1976), *aff'd* 559 F.2d 852 (2d Cir. 1977). Because the factual and legal issues in these cases were substantially the same as those presented in the case at bar, we

find them controlling. Accordingly, the court declines to follow the contrary approach taken in *Wright* v. *Califano*, 587 F.2d 345 (7th Cir. 1978).

In *White* v. *Mathews* the district court was presented with a class action similar to the one composed here. After examining the delays experienced by Title II claimants in Connecticut, the court found that the named plaintiff waited 274 days before his requested fair hearing was held. The average delay between request for a hearing and rendering of a hearing decision was 211.8 days. The court held such excessive delays are not reasonable within the meaning of § 405(b). The court ordered the Secretary to reduce the maximum delay between the filing of a petition for a hearing and the issuance of a hearing decision to 180 days within nine months of the court's order, to 150 days within 15 months of the order, and finally to a maximum delay of 120 days within 21 months of the order.

In *Barnett*, this court was presented with the issue of similar delays incurred by Vermont claimants of Title XVI (SSI) benefits. The named plaintiffs in that action experienced delays ranging from three to 13 months before requested hearings were held. The average delay experienced by the class plaintiffs (Vermont SSI claimants) ranged from one to 11 months. Relying upon *White*, the court held that these delays were unreasonable and ordered the Secretary to reduce the maximum delay between request for a hearing and the scheduling and holding of such hearing to 120 days within four months of the order and to 90 days within ten months of the order. The court imposed a maximum period of delay between request and holding of a hearing rather than, as the *White* court did, between request for a hearing and rendering of a hearing decision. Judge Coffrin was persuaded that such relief would afford the Secretary flexibility and at the same time protect SSI claimants' statutory rights.

The Secretary argues that the delays experienced here are not unreasonable because average or mean delays are within or close to the 90 day request-to-hearing maximum imposed in *Barnett* and the 120 day request-to-decision time imposed in *White*. The Secretary's discussion of averages and means does not meet the issue. The periods imposed in *White* and *Barnett* are periods of maximum, not average, delay which the Secretary may impose upon a claimant without violating his statutory right to a hearing within a reasonable time. While statistics afford only a limited picture of an agency's performance, the data presented by the government here reveals that in 1978 nearly half (43%) of the Vermonters who requested hearings in their claims for disability benefits waited more than 90 days for such hearings to be scheduled. This record shows that a substantial number of people have been denied their statutory right to a hearing within a reasonable time despite this court's order in *Barnett* that all such delays in SSI cases should be reduced to 90 days as of January 1, 1978. As Judge Feinberg noted in his opinion affirming that order, claimants under both Social Security programs (SSI and Disability Insurance) are entitled to a hearing within a reasonable time. *Barnett* v. *Califano*, 589 F.2d at 31-32 (2d Cir. 1978).

The Secretary presents several arguments against imposition of time limits such as those prescribed in *White*, *Barnett*, and *Caswell* v. *Califano*, 583 F.2d 9 (1st Cir. 1978). The arguments were considered and rejected in those cases. They include the claim that the SSA has made a good faith effort to meet the needs of claimants for disability benefits while protecting the fiscal integrity of its program with the limited resources available. While the SSA has made admirable strides in reducing the average length of delay experienced by claimants a few years ago, we concur with Judge Clarie's statement in *White* that the SSA is not war-

ranted in forcing claimants to endure such lengthy delays without benefits, while it puts its administrative appeals process in order.

> When the government does not act with reasonable promptness, those claiming total disability are required to bear an unreasonable delay and suffer unwarranted deprivation of that which is lawfully theirs.

White v. *Mathews*, 434 F.Supp. 1252 at 1261 (D.Conn. 1976). This observation is particularly true of the plaintiff Maurais, whose benefits were eventually reinstated after the administrative hearing.

The Secretary next contends that because Congress has chosen not to impose deadlines, but to leave the scheduling of hearings within the discretion of the Social Security Administrator, this court should also refrain from imposing deadlines.

The Second Circuit noted in *White*, and again in *Barnett*, that the legislative history indicates that Congress' refusal to impose time limits was based on an expectation, fostered by testimony of the Administrator, that a 90 day deadline would be met by the SSA in 1977. *White* v. *Mathews*, 559 F.2d 852 at 859-860 (1977); *Barnett* v. *Califano*, 580 F.2d 28 at 31 (1978). Judicially imposed time limits will not contravene Congressional expectations.

> More importantly, the lack of an express time limit cannot alter the statutory requirement that an applicant be afforded a reasonable opportunity for a hearing. The lack of a maximum time limit does not mean that any delay is reasonable.

Barnett v. *Califano*, Civ. Action No. 74-270, Slip op. at p. 7 (D.Vt.).

Finally, the Secretary states that she has proposed new regulations which would provide the relief requested by plaintiffs, i.e., imposition of a 90 day limit on the delay between request for a hearing and its

scheduled occurrence. She asks that this court abstain from action until the agency has an opportunity to put the proposed regulations into effect. As noted above, however, there is a present and immediate statutory duty to provide hearings within a reasonable time. Present violations of statutory duties are not to go unattended until the Secretary is administratively capable of correcting the deficiency in the future.

Having determined that plaintiffs are entitled to relief the court will fashion relief in this case similar to that afforded SSI claimants in *Barnett*, as modified by the Second Circuit. *Id.*, 580 F.2d 28 at 33. Imposition of a time limit between request for hearing and holding of a hearing will hopefully provide the Secretary with more flexibility than the time limit imposed by the *White* court between request for hearing and rendering of a hearing decision.

To this limited extent, the plaintiffs' motion for summary judgment is granted on the undisputed facts presented. However, the court will defer entry of a final order to accomplish this result until the remaining claim for relief in the reconsideration procedure is heard and determined.

The delays experienced by claimants at the reconsideration stage cannot be appropriately adjudicated by summary judgment. The record, as it now stands, is inadequate. Statistics proferred by the Secretary present only a partial picture of this phase of the reconsideration process since they center only upon DDS performance. In light of the delays experienced by plaintiff Day outside of DDS,[2] reliance upon such statistics would be

[2] Although the Rutland Social Security District Office took steps to forward plaintiff Day's file to DDS on the day he requested reconsideration, DDS did not receive the file until a month later. Once it received the file, DDS made its reconsideration decision within one day and immediately returned the file to Baltimore. There it remained inactive for nearly six weeks.

misplaced. More constructive statistics should develop the length of delays incurred by applicants, rather than the processing time of one particular phase of the reconsideration stage.

As to the delays suffered by claimants between the time they request reconsideration and a reconsideration determination is issued, the motions for summary judgment are denied as to both parties. The Clerk will schedule the case for trial on the reconsideration issue. It is so ORDERED.

Dated at Rutland, in the District of Vermont, this 28th day of December, 1979.

/s/ JAMES S. HOLDEN
JAMES S. HOLDEN
Chief Judge

The file was subsequently routed back to DDS for additional medical reports and then again returned to Baltimore. Thus, although DDS processed the file in 52 days, plaintiff Day nevertheless waited 167 days after his request before BDI issued a reconsideration decision. See defendant's answer to plaintiff's interrogatory #29.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Civil Action
File No. 78-266

Filed August 19, 1981

LEON S. DAY AND AMEDIE MAURAIS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED

v.

RICHARD SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES

MEMORANDUM OF DECISION

In this certified class action the plaintiffs challenge the procedures used by the Social Security Administration (SSA) to reconsider and schedule hearings for individuals who seek, but have been initially denied, Social Security disability benefits under Title II of the Social Security Act, 42 U.S.C. § 401 *et seq.* (the Act). The plaintiffs seek declaratory and injunctive relief from two types of delay encountered by claimants: the delay between the time a claimant requests reconsideration of his initial denial or cessation of benefits and the completion of the SSA's reconsideration of that finding; and the delay between the time a claimant requests an administrative hearing to review a denial of benefits and the time the hearing is scheduled.

The certified class consists of

> all present and future Vermont residents seeking to secure Social Security Disability benefits who, following an initial determination by the defendant tnat no disability exists, experienced an unreasonable delay in the scheduling of and/or issuance of decisions in reconsiderations and fair hearings.

In an opinion and order dated December 28, 1979, the court granted partial summary judgment to the plaintiffs, holding that the delays in scheduling the administrative hearings violated the Act's statutory directive to hold hearings within a reasonable time. Applying the rule of *Barnett* v. *Califano*, 580 F.2d 28 (2d Cir. 1978), the court required the Secretary to hold the administrative hearings within 90 days from the time they are requested, unless certain exceptions apply. The court denied the plaintiffs' motion for summary judgment on the issue of delay in the reconsideration process because the factual data in the record were not sufficient to support a summary judgment. On two subsequent occasions the court has similarly denied summary judgment on the reconsideration issue because of unresolved issues of fact.

In January, 1981, in response to discovery requests, the defendant produced factual summaries of 77 randomly selected disability reconsideration cases. Relying on their respective analyses of these summaries and all the other factual data in the record, the parties have again filed cross motions for summary judgment on the issue of reconsideration delays. The plaintiffs argue that reconsideration delays are unreasonable and request the court to direct the Secretary to complete the reconsideration process within 30 days, except in certain circumstances. The defendants maintain that the length of time to process requests for reconsideration is reasonable. Although the parties offer conflicting interpretations of the available facts, the facts themselves are not in dispute.

FACTUAL BACKGROUND

After the SSA has initially determined that a claimant is not entitled to Title II disability benefits the claimant may initiate an appeal of that denial only by requesting reconsideration of his claim at the SSA District Office (DO). *See* 20 C.F.R. § § 404.907-.910,

404.917 (1980). The DO locates the claimant's claim folder[1] and forwards it to the Vermont Disability Determination Agency (DDA). The DDA performs a *de novo* review of the evidence in the file. *See id.* § 404.914. Often, claimants seeking reconsideration allege changed medical circumstances or a worsening of condition. This review may thus include gathering new information pertaining to the claim and updating existing evidence. In some cases the DDA decides on its own to seek new evidence as well. The DDA may, at the reconsideration stage, order a consultative examination to aid in its determination.[2] *Id.* § 404.1527. In addition, if the DDA cannot make a disability determination on the basis of medical evidence alone, it may perform a vocational assessment in which a determination is made whether the claimant is capable of gainful work. *See id.* § § 404.1502-.1513.

When the DDA has completed its reconsideration, a claimant's case may follow one of several routes. If it is an "initial denial case," meaning one in which the claimant has not been receiving Title II disability payments for his claimed disability, the case folder is rerouted to the DO and a "reconsideration notice" is sent to the claimant from DDA. In several circumstances, however, generation of a reconsideration notice may be delayed. If the case involves "systems limitations" or "special handling,"[3] the reconsideration notice must be

[1] The claims folder may not necessarily be kept at the DO. Apparently some claims folders are kept at the SSA Office of Disability Operations in Baltimore, Maryland.

[2] A consultative examination is a physical or mental examination of the claimant undertaken at the expense of the SSA by a physician or other professional designated by the SSA. 20 C.F.R. § 404.1527 (1980).

[3] "Systems limitations," according to the Secretary, means that computers are not programmed to take required actions, cannot produce required information, or that the case is too

manually prepared and a delay may occur. Also, the DDA may undertake a "quality assurance review" of its own decision, thus delaying notification of the claimant. In addition, ten percent of all initial denial reconsiderations, after completion by DDA, are automatically forwarded to the Office of Disability Operations (ODO) in Baltimore, Maryland,[4] for a quality control review of the DDA determination, but the parties disagree over whether notices are sent before or after this ODO review is performed.

"Continuing disability investigation cases" in which the SSA has decided to stop paying disability benefits (also called "cessation cases"), are all sent to ODO for review prior to final reconsideration decision. The notice is sent from ODO instead of DDA.

Apart from the rather involved standard procedures, several other factors appear to contribute to the length of time to complete reconsideration: delays in requesting and receiving information, agency mishandling, new procedures, problems locating or communicating with claimants, interagency transmissions and other unaccounted for delays. It is clear that the length and nature of these delays depend somewhat upon the circumstances of each case. In any event, the procedural routes a claim must travel in the reconsideration process are uncertain and often devious.

In lieu of answers to a third set of interrogatories, the defendant submitted 77 case summaries randomly selected from a total of 453 reconsiderations performed

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complex for computer processing. Defendant's Answers to Third Interrogatories, Sept. 5, 1980, at 7. "Special handling" means, in the Secretary's words, "human intervention" or "special procedures to expedite the claims material." *Id.*

[4] The ODO was formerly called the Bureau of Disability Insurance, or "BDI"

between October 1, 1977 and January 31, 1980.[5] In the sample, total processing times ranged from 17 days to 251 days. The mean processing time was 68 days. About 35 percent of the claims, however, took more than 90 days to process. In all of the cases that took more than 90 days, as well as a significant number with lesser processing time, there are lengthy unexplained delays in the reconsideration process. The question is whether such delays are unreasonable under the circumstances. The plaintiffs interpret the summaries to show that unexceptional cases can be processed in 30 days or less, that delays beyond 30 days are almost never attributable to the claimant, and that delays beyond 90 days are generally due to DDA inaction or systems limitations and failures. The Secretary interprets the summaries to demonstrate that most delays result from the inherently time consuming nature of the reconsideration process. The summaries support the positions of both parties. They show the reconsideration process is often time consuming and complex. They also show that the process is replete with unexplained delay; other requests are processed with commendable dispatch.

DISCUSSION

This is the fourth time that the parties have addressed the reconsideration issue in summary judgment motions. Each previous time the court has found that the facts concerning the process were not sufficient. The submission of the 77 case summaries, however, satisfies the court that there are now no genuine issues of material fact in this dispute. The defendant, although he relies on the case summaries to support his own motion for summary judgment, asserts that they are

[5] Defendant's Answers to Third Interrogatories, March 30, 1981. The summaries are numbered consecutively from 1 to 77. References to specific summaries are by summary number.

not definitive or conclusive proof of delay. The court, however, finds that these summaries provide sufficient factual insight into the reconsideration process to rule on whether the delays are unreasonable.[6]

The plaintiffs contend that the delays they have experienced in obtaining reconsideration decisions are so lengthy that they are unreasonable and therefore contrary to provisions of the Social Security Act and the Administrative Procedure Act. They further argue that these delays deny them due process of law in violation of the Fifth Amendment. Because the court finds that unexplained delays that are not attributable to the claimant contravene the relevant provisions of the Social Security Act, it is unnecessary to rule on the other statutory provisions or the constitutional claim.

Section 205(b) of the Social Security Act, 42 U.S.C. § 405(b), provides in pertinent part:

> The Secretary is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Upon request by any such individual ... [the Secretary] shall give such applicant ... reasonable notice and opportunity for a hearing with respect to such decision

This provision gives a claimant a right to a hearing within a reasonable time. *White* v. *Mathews*, 559 F.2d 852, 858 (2d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978). Relying upon the controlling decisions of *Barnett* v. *Califano*, *supra*, and *White* v. *Mathews*, *supra*, this court has already held that the delays experienced by the plaintiffs in obtaining a hearing after it is

[6] The defendant provided the case summaries in lieu of specific answers to the plaintiff's interrogatories requesting detailed descriptions of all delays in all reconsiderations. That the defendant chose to submit this data as representative of the reconsideration process lends support to the finding that there are no genuine issues of fact.

requested violate this provision of the Act. *Day* v. *Harris* No. 78-266 (D.Vt. Dec. 28, 1979). The court is now called upon to go beyond the holdings of *Barnett* and *White* and find that delays in the reconsideration process, before a claimant requests a hearing, violate the same provision of the Act. The court finds that they do.

A claimant, upon initial denial of his claim by the SSA, cannot obtain a hearing until after the SSA has completed reconsideration of his claim. 20 C.F.R. § 404.917 (1980). The time necessary to complete a reconsideration is included in the time that the claimant must wait before he is afforded a hearing. Reconsideration is an administrative prerequisite to an appeal from the initial denial of benefits. Unreasonable delays in the reconsideration procedures trench on the statutory duty to provide a hearing within a reasonable time.

In *Barnett*, *White*, and other cases holding unreasonable the time between requesting and obtaining a hearing, the courts have observed the special importance of prompt adjudication of disability claims, given the "'typically modest resources of the family unit of the physically disabled worker . . .'" *White* v. *Mathews*, *supra*, 559 F.2d at 859 (quoting *Mathews* v. *Eldridge*, 424 U.S. 319, 342 (1976)). Weighing against this need for expeditious determination, however, is the Secretary's desire to perform a complete, high-quality review of the initial determination. The courts must give wide deference to procedures formulated by the Secretary and the SSA, an agency "to which Congress [has] confided the responsibility for substantive judgments." *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978). Moreover, Congress has not yet imposed statutory time limits on reconsideration or hearings in Title

II cases.[7] But Congress enacted a reasonableness requirement, and "the decision not to impose precise limits should not be interpreted as an endorsement of . . . delays." *White* v. *Mathews*, *supra*, 559 F.2d at 859-60.

The Secretary principally argues that the reconsideration process is necessarily complex and time-consuming, and that delays encountered in the process are therefore reasonable under the circumstances. The court disagrees. In each of the 27 of 77 case summaries in which reconsideration took longer than 90 days there are periods of unexplained delay, not directly attributable to necessary steps in the reconsideration process. In summary #41, for example, there is an unexplained three month delay between the time DDA received the case folder and the time that a consultative examination was "required." Summary #60 contains several unexplained delays, including two and one-half months between the time a vocational evaluation was prepared and the determination of denial was signed. The defendant contends that the delays often result from the fact that a case file is at ODO when reconsideration is filed, or that the DDA has difficulty obtaining evidence from third parties, or that ODO pre-adjudicative review is conducted, or that systems limitations occur. A claimant should not, however, have to endure delays caused by inefficient agency procedures or unnecessarily lengthy internal quality control checks. Moreover, when the *explained* delays in the case summaries are subtracted, most, if not all, of the cases could have been completed within 90 days. Accordingly, the court finds that, except when delay is attributable to the claimant,

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[7] Congress has addressed the problem of delays in Title II disability claims and has received the Report of the Department of Health and Human Services, Implementation of Section 308, P.L. 96-265—Time Limitations for Decisions on Title II Benefit Claims. This report recommends a 150 day limit for reconsiderations.

delays beyond 90 days in the reconsideration process are unreasonable and in violation of the Act.

The court declines, however, to go as far as the plaintiffs ask, and find that delays beyond 30 days are unreasonable. The Secretary has determined that *de novo* review is appropriate at the reconsideration stage. This review contemplates the generation of necessary supplemental evidence in addition to review of existing materials. A reasonable time for locating the claim folder, forwarding it to the appropriate agency, obtaining and assessing additional evidence, and generating notices must be allowed. The SSA should also retain some flexibility to implement additional statutory review and notice requirements in the future.[8].

Similarly, the record does not support the Secretary's contention that a 150 day limit for the reconsideration process is reasonable.[9]. Extending the 90 day limit for holding hearings, by a 90 day limit for reconsiderations burdens an aggrieved claimant with a 180 day wait from the time he initiates review of his entitlement until he gets his hearing. When the claimant is not responsible for the time of delay to the hearing stage, anything beyond the 90 day reconsideration phase becomes unreasonable. *See White* v. *Mathews*, 434 F. Supp. 1252, 1261 (D. Conn. 1976) ("When the government does not act with reasonable promptness, those claiming total disability are required to bear an unreasonable delay and suffer unwarranted deprivation of that which is lawfully theirs"), *aff'd*, 559 F.2d 852

[8] Beginning in 1981, the Secretary is required to review 15 percent of all DDA determinations finding disability before paying benefits. 42 U.S.C.A. § 421(c)(3) (West Supp. 1981). This mandatory percentage increases to 35 percent in 1982 and 65 percent thereafter. *Id.* As of July 1, 1981, the Secretary is required to send more personalized denial notices. *Id.* § 405 note.

[9] See note 7 *supra*.

(1977), *cert. denied*, 435 U.S. 908 (1978). Of course, reconsideration delays beyond 90 days are not necessarily unreasonable when they are caused at the claimant's instance or where the delay is assignable to the claimant's contention that changed circumstances mandate reconsideration of additional evidence.

Accordingly, the court will impose a 90 day limit on the time from reconsideration request to the issuance of notice of the results of reconsideration, except in the following circumstances:

1) the claimant offers new medical evidence or reports new medical treatment since his initial determination;

2) the claimant agrees to undergo a consultative examination when one is suggested by the defendant;

3) the claimant or his representative causes a delay by failing to provide information needed for reconsideration;

4) the claimant or his representative requests a delay;

5) the delay is in some other way attributable to the aggrieved claimant or his representative.

The court will not, however, order payment of interim benefits to claimants who suffer delays of more than 90 days in the reconsideration process. Imposition of such relief would create undue complexity and difficulty in monitoring and enforcing the order.[10] Instead, the

[10] For example, if a claimant did not receive a reconsideration notice within 90 days, the Secretary would have to begin paying interim benefits. After generating a reconsideration notice denying benefits, the Secretary would then stop payments. The Secretary would then be permitted to recoup the interim benefits. *See Barnett v. Califano, supra*, 580 F.2d at 33. The process would be repeated if the Secretary failed to hold a hearing within 90 days of request. Such a remedial scheme would undoubtedly create uncertainty for claimants, implementation problems for the Secretary, and enforcement difficulties for the court.

court will order the Secretary to pay interim benefits to claimants in the event a hearing on the claimant's entitlement is not held within 180 days from the date reconsideration is requested. This will permit the SSA 90 days to complete reconsideration and 90 days to hold a requested hearing. The Secretary shall be entitled to recoup such interim benefits in the event entitlement is ultimately denied.

If the SSA takes between 90 and 180 days to complete reconsideration, but allows the claimant benefits upon reconsideration, the claimant will, of course, receive no interim relief. But the court is persuaded that this solution most appropriately balances the administrative difficulties in implementing this order and the financial needs of deserving claimants. *Cf. White* v. *Mathews*, *supra*, 559 F.2d at 860 (upholding the district court order granting interim benefits in limited circumstances as an equitable accommodation of administrative difficulties and wage earners' needs); *Caswell* v. *Califano*, 435 F. Supp. 127, 135-36 (D. Me. 1977) (ordering that disability claims hearings be held within 90 days of request, but declining to order payment of interim benefits), *aff'd*, 583 F.2d 9 (1st Cir. 1978).

The court will direct that judgment be entered after thirty days from the filing and service of a copy of this order on counsel of record. The parties may apply for leave to be heard on the settlement of the final judgment order.

It is so ORDERED.

Dated at Rutland, in the District of Vermont, this 19th day of August, 1981.

/s/ JAMES S. HOLDEN

JAMES S. HOLDEN
Chief Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Civil Action No. 78-266

Filed Nov. 6, 1981

LEON S. DAY AND AMEDIE MAURAIS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS,

v.

RICHARD S. SCHWEIKER, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANT.

JUDGMENT ORDER

IT IS HEREBY ORDERED that judgment be entered as follows:

IT IS HEREBY ADJUDGED that defendant's failure to provide prompt administrative reconsideration decisions and prompt administrative law judge hearings to claimants for Title II disability insurance benefits residing in the District of Vermont who request such reconsideration and/or hearing before an administrative law judge following adverse initial determination by the defendant that they are not disabled conflicts with the "reasonable notice and opportunity for a hearing" requirement of 42 U.S.c. § 405(b).

IT IS FURTHER ORDERED AND ADJUDGED THAT:

(1) The plaintiffs' motion for class certification was GRANTED on June 14, 1979, the class consisting of:

> all present and future Vermont residents seeking to secure Social Security Disability benefits who, following an initial determination by the defendant that no disability exists, experienced an unreasonable delay in the scheduling of and/or issuance of decisions in reconsiderations and fair hearings.

(2) The defendant is enjoined, ordered, and directed to conclude reconsideration processing and issue reconsideration determinations within 90 days of requests for reconsideration made by claimants, pursuant to 20 C.F.R. § 404.909 or other applicable regulations, seeking Title II disability insurance benefits under § 205(b) of the Social Security Act, 42 U.S.C. § 405(b), except in the following circumstances:

(a) The claimant offers new medical evidence or reports new medical treatment since his initial determination;

(b) The claimant agrees to undergo a consultative examination when one is suggested by the defendant;

(c) The claimant or his representative causes a delay by failing to provide information needed for reconsideration;

(d) The claimant or his representative requests a delay; or

(e) The delay is in some other way attributable to the aggrieved claimant or his representative.

(3) The time period aforementioned in paragraph (2) shall apply to reconsideration requests made on or after the effective day of this order and shall commence with the date of receipt by defendant of a formal written request for reconsideration filed pursuant to 20 C.F.R. § 404.909 or other applicable regulations. In the event that the last day of said time period falls upon a Saturday, Sunday, or legal holiday (as defined by Fed. R. Civ. P. Rule 6(a)), the enumerated period shall run until the end of the next day which is not a Saturday, Sunday, or legal holiday.

(4) The defendant is enjoined, ordered, and directed to conduct administrative law judge hearings within 90 days of requests for hearings made by claimants for Title II disability insurance benefits pursuant to § 205(b)

of the Social Security Act, 42 U.S.C. § 405 (b), except in the following circumstances:

(a) The claimant or his representative causes a delay by failing to provide information needed for adjudication;

(b) The claimant or his representative requests a delay;

(c) The claimant or his representative fails to appear for the scheduled hearing

(d) The delay is in some other way attributable to the claimant or his representative.

(5) The time period aforementioned in paragraph (4) shall apply to hearing requests made since issuance of the Court's preliminary injunction on December 30, 1980, and shall commence with the date of receipt by defendant of a formal written request for hearing filed pursuant to 20 C.F.R. § 404.933 or other applicable regulations. In the event that the last day of said time period falls upon a Saturday, Sunday or legal holiday (as defined by Fed. R.Civ.P. Rule 6(a)), the enumerated period shall run until the end of the next day which is not a Saturday, Sunday or legal holday.

(6) The defendant is enjoined, ordered and directed to grant prospective interim Title II disability insurance payments to Title II disability claimants in any of the following circumstances:

A. No reconsideration determination is issued within 180 days of the request for reconsideration. Said payments shall begin with the first month after the month in which the 180 day time limit is exceeded and shall end with the conclusion of the month in which the reconsideration determination is mailed. Said time period shall apply to the reconsideration requests made on or after the effective date of this Order and shall commence with the date of receipt by defendant of a formal written request for reconsideration filed pursuant to 20 C.F.R. § 404.909 or other applicable regulations.

B. No hearing is held within 180 days of a prior request for reconsideration that is followed by a hearing request. The passage of time between the issuance of the written decision of reconsideration and the date of receipt of the written hearing request shall be excluded from this time period. The interim payments shall begin with the first month after the month in which the 180 day time limit is exceeded and shall end with the conclusion of the month in which the hearing before the administrative law judge is held. Said time period shall apply to reconsideration requests made on or after the effective date of this Order and shall commence with the date of receipt by defendant of a formal written request for reconsideration filed pursuant to 20 C.F.R. § 404.909 or other applicable regulations.

C. No hearing is held within 90 days of a request for hearing. Said payments shall begin with the first month after the month in which the 90 day time period is exceeded and shall end with the conclusion of the month in which the hearing before an administrative law judge is held.

Nothing in this order shall be construed to require the payment of retroactive Title II disability insurance benefits based upon the alleged date of disability onset. Nothing in this order shall be construed to limit the defendant's right to recover payments made under this paragraph, pursuant to standard overpayment procedures, if it is finally determined that the individual so paid is not under a disability for any period in which the payments are made pursuant to this paragraph.

(7) Benefits paid pursuant to this order shall be suspended if the claimant refuses to cooperate in attending a scheduled hearing or in going to a consultative examination or in obtaining any other necessary evidence.

(8) Beginning with each applicable administrative appellate request received on the 61st day after the entry of this order and continuing thereafter, the defendant is directed to notify in writing each claimant who requests

a reconsideration or an administrative law judge hearing of his or her rights under the order by including a brief statement of the rights accorded hereunder. Said written notice may be given to the claimant personally or may be included in any mailing to the claimant regarding his appellate request but shall not require a separate special mailing by the Social Security office. The plaintiff and defendant will provide this Court with an agreed upon statement of notice.

(9) This order shall become effective on the sixty-first day following its entry except as otherwise provided in paragraphs 5 and 6 *supra*.

(10) This order shall not apply to claims for concurrent benefits under Title II and Title XVI, which are included in *Barnett* v. *Califano*, 580 F.2d 28 (2d Cir. 1978), but shall apply to disability claims under Title II only.

(11) This decree shall be binding upon the Secretary of Health and Human Services when adjudicating administrative reconsiderations and hearings within the State of Vermont.

(12) Within sixty (60) days from the date of this Order, the defendant shall submit to the Court and to the plaintiffs' attorneys a detailed statement or plan for implementing the relief required herein on a continued basis, and the actual administrative steps taken to effectuate said plan. Any disputes between the parties as to whether the procedure and steps outlined by the defendant will fulfill the requirements of this Order shall be resolved by the Court.

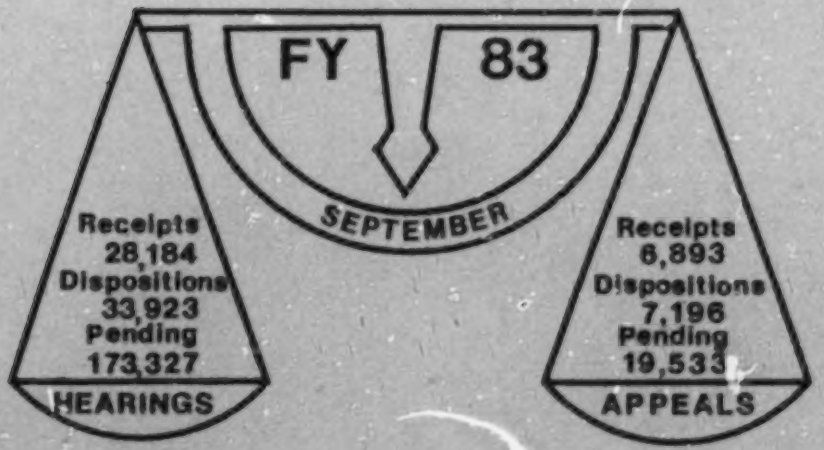
(13) This Court shall retain continuing jurisdiction over this cause to insure compliance with the provisions of this Order for a period of no less than one year from the date hereof.

Dated at Rutland, in the District of Vermont, effective this 30th day of October, 1981 and entered November 6, 1981.

/s/ JAMES S. HOLDEN

HONORABLE JAMES S. HOLDEN
Chief Judge
U.S. District Court for the
District of Vermont

OFFICE OF HEARINGS AND APPEALS



KEY WORKLOAD INDICATORS

CONTENTS

		PAGE NO.
I.	HEARING WORKLOADS	
	1. National Summary - Hearings	1
	2. Regional Summary Hearings	2
	3. Regional Reversal Rates	3
	4. Program Summary	4
	A. Current Month	4
	B. Cumulative	4
	5. Age of Pending	5
	6. Distribution of Hearing Dispositions	6
	7. Compliance with Time Limit Regulations	7
II.	APPEALS WORKLOADS	
	1. National Summary - Appeals	8
	2. Program Summary	9
	A. Current Month	9
	B. Cumulative	9
	3. Requests for Review by Program	10
	A. Current Month	10
	B. Cumulative	10
	4. Own Motion and Reopening by Program	11
	A. Current Month	11
	B. Cumulative	11
	5. Performance and Staffing Report	12
	6. Average Processing Times	13
	7. Compliance With Time Limit Regulations	13
III.	CIVIL ACTIONS WORKLOADS	
	1. New Court Cases	14
	2. Court Remands	14
	3. Compliance with Time Limit Regulations	14
IV.	DISABILITY WORKLOAD TRENDS	15
V.	OHA STAFFING	16

ADDRESSEES

OMBP	OAC	OA	OCALJ
RC	OHA-ES	OAO	ORCALJs
OFO	ODAC	OPP	OFA
OGC	OMS	AC	
	DMA	HOIS	
	LRPS		
	DFM		

Prepared by: DSS/OHA
10/26/83

NATIONAL SUMMARY - HEARINGS

FISCAL YEAR	RECEIPTS	DISPOSITIONS	PENDING (END OF)	AVG. NO. OF ALJS ON DUTY1/	AVG. SUP. STAFF RATIO 2/	AVG. DISP. PER ALJ1/	ALJ EQ.7/	AVG. PROCESSING TIMES3/	AVG. NO. OF CASES PENDING PER ALJ1/	AVG. AGE OF PENDING CASES4/	DAYS WORTH OF RECEIPTS PENDING
FY 73	72,202	68,355	36,780	420	2.2	14	N.A.	174	117	N.A.	184
FY 74	121,504	80,783	77,233	478	2.7	13	19	164	122	N.A.	224
FY 75	154,962	121,026	111,169	591	2.9	16	29	262	173	219	260
FY 76	157,688	179,088	89,769	647	3.6	21	32	288	153	285	203
FY 76 TRANS. QTR.5/	45,418	50,271	84,916	637	3.6	21	32	233	137	236	187
FY 77	193,657	186,822	91,7516/	629	3.8	25	33	215	136	185	163
FY 78	196,428	215,445	74,747	657	3.9	27	37	179	128	133	134
FY 79	226,240	210,775	90,212	655	4.3	27	37	151	141	104	138
FY 80	252,023	232,599	109,636	669	4.4	30	41	159	169	109	152
FY 81	281,737	262,609	128,764	699	4.4	32	45	164	188	119	163
FY 82	320,680	296,548	152,896	754	4.7	34	49	174	203	124	168
FY 83	MO. CUM.	MO. CUM.									
October	26,838 26,838	25,406 25,406	154,328	813	4.4	33	48	177	202	124	168
November	28,039 54,877	25,561 50,967	156,806	812	4.5	33	48	179	204	125	169
December	28,237 83,114	24,277 75,244	160,766	809	4.5	31	46	182	207	127	175
1st Qtr.	84,213	76,343	160,766	811	4.5	33	NA	NA	207	127	174
January	28,505 112,718	26,732 103,075	162,539	804	4.5	34	51	189	209	129	176
February	24,375 137,093	25,713 128,788	161,201	802	4.5	33	48	188	206	131	177
March	33,112 170,205	30,204 158,992	164,109	799	4.6	39	57	185	210	125	175
2nd Qtr.	88,634 172,847	84,006 160,349	165,394	801	4.5	36	NA	NA	212	128	174
April	31,471 204,318	28,249 188,598	168,616	796	4.6	36	53	185	216	122	172
May	32,264 236,582	29,172 217,770	171,708	793	4.6	38	55	185	221	121	172
June	35,263 271,845	29,604 247,374	177,367	788	4.7	38	56	183	229	119	170
3rd Qtr.	99,805 272,652	88,054 248,403	177,145	792	4.6	38	NA	NA	228	119	169
July	29,238 301,890	28,047 276,450	178,336	783	4.7	36	53	183	232	121	170
August	32,149 334,039	31,419 307,869	179,066	780	4.7	41	60	183	234	122	169
September	28,184 362,223	33,923 341,792	173,327	775	4.7	45	61	183	228	124	169

1/ FY 77 - FY 82 includes RCALJs. Beginning FY 83 ALJ average dispositions are calculated using one-fourth of a work month for each RCALJ, and excludes ALJs on leave in excess of 30 consecutive calendar days. ALJ average dispositions are calculated to include the learning curve for new ALJs.
2/ Permanent Staff FY 73 - 78; FY 79 - FY 82 includes ORCALJ and temporary positions; beginning FY 83 includes only hearing office full-time permanent staff excluding interpreters.
3/ Median Times for FY 73 - FY 74; beginning FY 75 mean times - SSI cases not included until FY 76 transition quarter.
4/ SSI cases not included until FY 76 transition quarter.
5/ Covers period June 20, 1976 - October 2, 1976.
6/ Adjusted up 2,013 cases from FY 77 due to conversion from a manual to an automated reporting system.
7/ Beginning FY 1981 based on 1979 standard time values.

REGIONAL SUMMARY HEARINGS

REGION	RECEIPTS		DISPOSITIONS		PENDING		AVERAGE NUMBER OF ALJS ON DUTY2/		AVERAGE RECEIPTS PER ALJ2/		AVERAGE DISPOSITIONS PER ALJ2/		ALJ EQUIVALENT2/		AVERAGE NUMBER OF CASES PENDING PER ALJ2/		AVERAGE PROCESSING TIME BY PHYSICAL LOCATION	
	AUG	SEPT	AUG	SEPT	AUG	SEPT	AUG	SEPT	AUG	SEPT	AUG	SEPT	AUG	SEPT	AUG	SEPT	AUG	SEPT
I	1,433	1,179	1,332	1,240	6,576	6,515	36	35	42	34	38.6	36.2	56	54	191	190	211	222
II	4,465	4,043	4,763	4,999	22,519	21,563	111	111	40	37	43.2	45.5	63	67	204	196	166	166
III	3,567	3,304	3,204	3,344	19,489	19,449	89	86	41	38	37.1	39.7	56	60	226	231	178	180
IV	8,464	7,109	6,950	6,603	38,195	38,701	150	150	57	48	46.7	44.4	69	66	257	260	153	157
V	5,083	4,880	5,477	5,837	31,890	30,933	144	142	35	35	38.2	41.8	57	63	223	221	216	212
VI	3,431	3,269	3,554	3,555	20,148	19,862	83	83	42	41	43.7	44.3	66	67	248	247	174	173
VII	1,359	1,030	1,214	1,349	7,574	7,255	29	29	50	38	44.6	49.5	64	71	278	266	181	189
VIII	712	535	407	163	3,779	3,651	16	17	47	33	26.7	40.8	38	56	248	225	206	218
IX	2,715	2,418	3,919	5,348	22,758	19,828	98	98	28	25	40.5	55.0	54	52	235	204	201	188
X	625	204	490	914	4,868	4,158	20	20	32	11	25.5	47.5	34	32	253	216	267	205
National H.Q.	295	213	109	71	1,270	1,412	4	4	74	53	27.2	17.8	37	22	318	353	198	269
NATION	32,149	28,184	31,419	33,923	179,066	173,327 1/	780	775 3/	42	37	41.0	44.6	60	61	234	228	183	183
DIFFERENCE	-3,965		+2,504		-5,739		-5		-5		+3.6		+1		-6		-	

	OCT.	NOV.	DEC.	JAN.	FEB.	MAR.	APR.	MAY	JUN.	JUL.	AUG.	SEPT.	DIFF. BETWEEN LAST TWO MOS.
No. of work days during mo.	20	20	21	21	19	23	21	21	22	20	23	21	-2
Disp. each workday during mo.	1270	1278	1156	1273	1353	1313	1345	1389	1346	1402	1366	1615	+249
Disp. per ALJ each workday	1.66	1.66	1.49	1.64	1.73	1.68	1.72	1.79	1.74	1.82	1.78	2.12	+0.34

1/ Based on current workload projections and related budget assumptions, the pending will be 182,579 by the end of the fourth quarter FY 1983; 182,061 by the end of the first quarter FY 1984, and 180,630 by the end of the second quarter FY 1984.

2/ ALJ average dispositions are calculated using the learning curve for new ALJs; one-fourth of a work month for each RCALJ; and excludes ALJs on leave in excess of 30 consecutive calendar days.

3/ 626 fully experienced ALJs would have been required in September to have disposed of the same number of cases as were received assuming the National rate of 45 dispositions per ALJ.

Regional Reversal Rate by Program
September 1983

REGION	RSI % Allowed of Total DEC	RSI % Allowed of Total DISP	DWIB % Allowed of Total DEC	DWIB % Allowed of Total DISP	DIWC % Allowed of Total DEC	DIWC % Allowed of Total DISP	HI % Allowed of Total DEC	HI % Allowed of Total DISP	BL % Allowed of Total DEC	BL % Allowed of Total DISP	SSI ONLY % Allowed of Total DEC	SSI ONLY % Allowed of Total DISP	CONCURRENT TITLE II/XVI SSI % Allowed of Total DEC	CONCURRENT TITLE II/XVI SSI % Allowed of Total DISP	TOTAL % Allowed of Total DEC	TOTAL % Allowed of Total DISP
I	25.0	22.2	16.0	15.4	60.8	57.9	56.7	50.0	-	-	65.3	58.7	59.6	54.3	59.8	55.6
II	20.0	16.4	33.3	29.0	59.9	55.4	44.1	36.0	-	-	48.7	43.1	55.2	49.6	56.3	51.2
III	36.0	29.5	44.3	38.6	68.5	65.3	68.8	61.1	100.0	100.0	52.2	45.5	58.8	53.1	63.9	58.3
IV	40.5	35.7	31.1	27.8	66.9	63.7	66.7	50.0	50.0	50.0	49.7	44.9	56.5	51.6	61.5	57.4
V	32.5	28.7	25.0	21.7	60.9	57.8	61.1	46.8	25.0	25.0	48.9	43.2	52.0	47.5	56.8	52.8
VI	43.8	36.8	25.0	22.7	62.1	59.6	100.0	66.7	-	-	50.5	45.6	57.3	52.2	59.0	55.4
VII	40.0	34.5	33.3	27.8	72.9	68.7	83.3	83.3	-	-	63.7	55.7	61.6	55.2	68.2	62.7
VIII	53.2	47.1	-	-	76.9	64.5	100.0	100.0	-	-	67.1	58.9	64.4	59.5	70.7	61.1
IX	46.5	39.2	46.2	36.7	77.4	34.8	83.3	45.5	-	-	59.9	43.7	70.4	34.4	70.6	36.2
X	25.0	20.0	25.0	25.0	73.5	17.4	100.0	100.0	-	-	69.2	18.4	77.8	25.8	71.7	19.1
National H.O.	-	-	-	-	82.9	67.4	-	-	-	-	20.0	14.3	73.3	55.0	73.2	57.7
NATION	36.5	31.2	31.2	27.2	65.2	55.7	55.1	44.6	45.5	45.5	53.2	45.0	58.4	47.3	61.1	51.5

STATUS REPORT OF HEARING WORKLOADS BY PROGRAM
FOR THE MONTH: September 01 - September 30, 1983

PROGRAM	RECEIPTS	DISPOSITIONS							PENDING
		AFFIRMED	REVERSED	TOTAL DECISIONS	% ALLOWED OF TOTAL DECISIONS	DISMISSED	TOTAL DISPOSITIONS	% ALLOWED OF TOTAL DISPOSITIONS	
RSI	557	259	149	408	36.5%	69	477	31.2%	3,305
DWIB	542	318	144	462	31.2%	67	529	27.2%	3,287
DI	16,076	6,142	11,519	17,661	65.2%	3,023	20,684	55.7%	101,890
HI	290	97	119	216	55.1%	51	267	44.6%	1,755
BL	10	6	5	11	45.5%	-	11	45.5%	59
SSI ONLY	4,080	1,809	2,054	3,863	53.2%	706	4,569	45.0%	24,626
CONCURRENT TITLE II/ TITLE XVI SSI	6,629	2,485	3,490	5,975	58.4%	1,411	7,386	47.3%	38,405
TOTAL	28,184	11,116	17,480	28,596	61.1%	5,327	33,923	51.5%	173,327
CHANGE FROM PREVIOUS MONTH	-3,965	-144	-47	-191	+0.2%	+2,695	+2,504	-4.3%	-3,739

CUMULATIVE: October 01, 1982 - September 30, 1983 1/

PROGRAM	RECEIPTS	DISPOSITIONS							PENDING
		AFFIRMED	REVERSED	TOTAL DECISIONS	% ALLOWED OF TOTAL DECISIONS	DISMISSED	TOTAL DISPOSITIONS	% ALLOWED OF TOTAL DISPOSITIONS	
RSI	5,950	2,980	1,706	4,686	36.4%	978	5,664	30.1%	3,305
DWIB	6,142	3,498	1,586	5,084	31.2%	694	5,778	27.4%	3,287
DI	212,095	66,302	111,254	177,556	62.7%	13,926	191,482	58.1%	101,890
HI	3,808	1,106	1,354	2,460	55.0%	1,316	3,776	35.9%	1,755
BL	120	70	56	126	44.4%	22	148	37.3%	59
SSI ONLY	53,722	22,274	24,115	46,389	52.0%	7,105	53,494	45.1%	24,626
CONCURRENT TITLE II/ TITLE XVI SSI	80,386	32,867	39,797	72,664	54.8%	8,786	81,450	48.9%	38,405
TOTAL	362,223	129.097	179,868	308,965	58.2%	32,627	341,792	52.6%	173,327
CHANGE FROM SAME PERIOD LAST YEAR	+45,432	+18,848	+24,782	+43,630	-0.2%	+3,876	+47,506	-0.1%	+22,038

1/ Does not include quarterly adjustment.

HEARING PENDING WORKLOAD

The Total Number of Pending Cases and Mean Age in Days with a Breakout of the Number and Percent of Pending Cases Over 120, 180 and 365 Days Old, by Region and National Data, September 1983

(Mean Elapsed Days Measured From Hearing Filed Date)

REGION	TOTAL PENDING CASES	MEAN AGE IN DAYS	NUMBER AND PERCENT OF PENDING CASES					
			OVER 120 DAYS		OVER 180 DAYS		OVER 365 DAYS	
			NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT
I	6,515	131	2,653	40.7%	1,419	21.8%	330	5.1%
II	22,563	117	8,020	37.2%	3,059	14.2%	357	1.7%
III	19,449	119	7,839	40.3%	3,491	17.9%	464	2.4%
IV	38,701	99	12,344	31.9%	4,078	10.5%	374	1.0%
V	30,933	137	13,892	44.9%	7,417	24.0%	1,548	5.0%
VI	19,862	115	7,639	38.5%	3,115	15.7%	374	1.9%
VII	7,255	115	2,743	37.8%	1,217	16.8%	150	2.1%
VIII	3,651	161	2,005	54.9%	1,130	31.0%	307	8.4%
IX	19,828	152	10,623	53.6%	6,139	31.0%	1,022	5.2%
X	4,158	195	2,739	65.9%	1,713	41.2%	530	12.7%
National H.Q.	1,412	191	955	67.6%	662	46.9%	113	8.0%
NATION	173,327	124	71,452	41.2%	33,440	19.3%	5,569	3.2%
NATIONAL CHANGE FROM PREVIOUS MONTH	-5,739	+2	+904	+1.8%	-302	+0.5%	-34	+0.1%

NATIONAL SUMMARY

DISTRIBUTION OF HEARING CASES DISPOSED OF IN SEPTEMBER 1983

DISPOSED OF WITHIN:	CASES - EXCLUSIONS APPLIED		CASES - EXCLUSIONS NOT APPLIED	
	NUMBER	PERCENT	NUMBER	PERCENT
120 Days	9,800	29.0%	8,052	23.8%
135 Days	13,268	39.2%	11,267	33.3%
150 Days	16,602	49.0%	14,497	42.8%
165 Days	19,760	58.4%	17,754	52.4%
180 Days	22,386	66.1%	20,611	60.8%
195 Days	24,456	72.3%	22,891	67.6%
210 Days	26,262	77.6%	24,939	73.6%
225 Days	27,534	81.3%	26,368	77.8%
240 Days	28,610	84.5%	27,575	81.4%
255 Days	29,442	87.0%	28,538	84.2%
270 Days	30,155	89.1%	29,343	86.6%
285 Days	30,668	90.6%	29,974	88.5%
300 Days	31,181	92.1%	30,580	90.2%
315 Days	31,596	93.3%	31,101	91.8%
330 Days	31,952	94.4%	31,534	93.1%
345 Days	32,243	95.3%	31,886	94.1%
360 Days	32,478	96.0%	32,179	95.0%

COMPLIANCE WITH TIME LIMIT REGULATIONS
FOR THE MONTH: September 01 - September 30, 1983
HEARING LEVEL

REGION	DISPOSITIONS	165 DAY LIMITS				180 DAY LIMITS			
		NOT IN COMPLIANCE		EXCLUSIONS APPLIED		NOT IN COMPLIANCE		EXCLUSIONS APPLIED	
		NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT
I	1,230	664	54.0%	46	3.7%	585	47.6%	21	1.7%
II	4,988	1,925	38.6%	475	9.5%	1,556	31.2%	149	3.0%
III	3,331	1,267	38.0%	783	23.5%	1,161	34.9%	292	8.8%
IV	6,574	1,860	28.3%	1,556	23.7%	1,617	24.6%	592	9.0%
V	5,814	3,168	54.5%	1,021	17.6%	2,883	49.6%	410	7.1%
VI	3,550	1,389	39.1%	797	22.5%	1,267	35.7%	252	7.1%
VII	1,344	655	48.7%	304	22.6%	641	47.7%	101	7.5%
VIII	659	372	56.4%	133	20.2%	355	53.9%	51	7.7%
IX	5,330	2,221	41.7%	1,079	20.2%	2,110	39.6%	540	10.1%
X	913	411	45.0%	75	8.2%	368	40.3%	36	3.9%
National H.O.	70	66	94.3%	-	0.0%	60	85.7%	-	0.0%
NATION	33,803	13,998	41.4%	6,269	18.5%	12,603	37.3%	2,444	7.2%

Note: Compliance with the 180 day time limits is measured by extending the 180 days by the time of any delay in excess of 60 days.

NATIONAL SUMMARY - APPEALS

FISCAL YEAR	RECEIPTS	DISPOSITIONS	PENDING (END OF) 1/	AVERAGE PROCESSING TIMES 2/	GRANT REVIEW RATE 3/	CENTRAL OFFICE FILING RATE 4/
FY 73	17,789	17,773	4,381	68	22.6%	56.4%
FY 74	23,097	21,445	6,033	60	19.0%	58.1%
FY 75	36,677	30,063	12,647	82	12.2%	61.8%
FY 76	48,759	48,380	13,026	82	13.8%	61.4%
FY 76 Trans. Qtr. 4/	12,981	16,659	9,348	78	18.1%	57.2%
FY 77	47,719	52,273	4,794	108	15.0%	66.8%
FY 78	52,490	48,900	8,384	75	8.3%	62.3%
FY 79	51,537	53,566	6,355	72	12.7%	65.5%
FY 80	49,742	49,466	6,631	66	12.9%	64.8%
FY 81	55,912	54,095	8,448	67	12.5%	57.3%
FY 82	68,935	63,559	13,824	NA	10.8%	51.0%

FY 83	RECEIPTS MO.	RECEIPTS CUM.	DISPOSITIONS MO.	DISPOSITIONS CUM.	PENDING (END OF) 1/	AVERAGE PROCESSING TIMES 2/	GRANT REVIEW RATE 3/	CENTRAL OFFICE FILING RATE 4/
October	5,716	5,716	5,320	5,320	14,220	80	8.0%	52.3%
November	8,154	13,870	5,303	10,623	17,071	88	10.2%	61.4%
December	6,513	20,383	5,328	15,951	18,256	99	9.7%	54.7%
1st Qtr.		20,472		16,040	18,256	NA	9.4%	59.8%
January	6,449	26,921	6,938	22,978	17,767	104	8.5%	66.7%
February	6,559	33,480	6,449	29,427	17,877	99	7.8%	52.2%
March	7,080	40,560	9,295	38,722	15,662	94	7.3%	61.5%
2nd Qtr.	22,496	42,968	22,859	38,899	17,893	NA	8.8%	64.9%
April	7,218	50,186	8,538	47,437	16,573	93	8.6%	56.5%
May	7,908	58,094	9,149	56,586	15,332	86	8.7%	56.5%
June	10,652	68,746	8,262	64,848	17,722	89	10.1%	55.3%
3rd Qtr.*	28,713	71,681	25,949	64,848	20,657	NA	9.4%	58.2%
July*	6,552	78,233	7,629	72,477	19,580	75	7.0%	59.4%
August*	8,780	87,013	8,524	81,001	19,836	74	7.6%	N.A.
September*	6,893	93,906	7,196	88,197	19,533	85	7.1%	N.A.

1/ Includes cases pending in Docket and Files without claim files.
2/ FY 73 FY 76 Transition Quarter median times are used which represent the last month in each fiscal year, excludes SSI cases; beginning FY 77 times represent mean days for the entire fiscal year, includes SSI cases. Own motion cases are included in the calculation of FY 83 processing times. Lag time between the claim file receipt date and the AC disposition date is used in the calculation.
3/ Based on requests for review only.
4/ Based on ALJ affirmations allowing a 30 day lag.
5/ Covers period June 20, 1976 October 02, 1976.
* Preliminary

APPEALS WORKLOADS

STATUS REPORT OF APPEALS WORKLOADS BY PROGRAM 1/*
FOR THE MONTH: September 01 - September 30, 1983

PROGRAM	RECEIPTS	DISPOSITIONS						PENDING	(%)
		AFFIRMED	REVERSED	DISMISSED	DENIED	REMAND	TOTAL		
RSI	110	-	13	2	130	6	151	284	(1%)
DI/DWIB	4,176	11	150	65	3,664	245	4,135	11,632	(60%)
HI	116	-	2	1	73	8	84	291	(1%)
BL	1	-	-	-	1	-	1	8	(0%)
SSI ONLY	874	5	24	21	858	50	958	2,506	(13%)
CONCURRENT TITLE II/ TITLE XVI SSI	1,616	3	65	47	1,627	125	1,867	4,812	(25%)
TOTAL	6,893	19	254	136	6,353	434	7,196	19,533	(100%)
CHANGE FROM PREVIOUS MONTH	-1,887	-34	-140	-29	-1,114	-11	-1,328	-303	

CUMULATIVE: October 01, 1982 - September 30, 1983*

PROGRAM	RECEIPTS	DISPOSITIONS						PENDING
		AFFIRMED	REVERSED	DISMISSED	DENIED	REMAND	TOTAL	
RSI	1,535	32	124	41	1,226	108	1,531	284
DI/DWIB	53,722	292	2,631	808	42,675	2,882	49,288	11,632
HI	738	2	40	11	388	80	521	291
BL	41	5	6	3	26	3	43	8
SSI ONLY	13,132	67	613	328	11,266	572	12,846	2,506
CONCURRENT TITLE II/ TITLE XVI SSI	24,738	139	1,074	509	20,968	1,278	23,968	4,812
TOTAL	93,906	537	4,488	1,700	76,549	4,923	88,197	19,533
CHANGE FROM SAME PERIOD LAST YEAR	+26,565	+282	+1,782	+116	+23,035	+27	+25,242	+6,699

1/ Includes requests for review and own motion cases.
* Preliminary

REQUESTS FOR REVIEW DISPOSITIONS BY PROGRAM 1/
FOR THE MONTH: September 01 - September 30, 1983

PROGRAM	DISPOSITIONS					
	AFFIRMED	REVERSED	DISMISSED	DENIED	REMAND	TOTAL
RSI	-	8	2	130	6	146
DI/DWIB	7	82	64	3,660	156	3,969
HI	-	2	1	73	8	84
BL	-	-	-	1	-	1
SSI ONLY	5	23	21	857	48	954
CONCURRENT TITLE II/ TITLE XVI SSI	3	51	47	1,623	96	1,820
TOTAL	15	166	135	6,344	314	6,974

CUMULATIVE: October 01, 1982 - September 30, 1983 1/

PROGRAM	DISPOSITIONS					
	AFFIRMED	REVERSED	DISMISSED	DENIED	REMAND	TOTAL
RSI	27	93	40	1,224	102	1,486
DI/DWIB	226	1,300	798	42,616	2,088	47,228
HI	2	40	10	388	78	518
BL	5	6	3	25	3	42
SSI ONLY	61	560	325	11,253	546	12,745
CONCURRENT TITLE II/ TITLE XVI SSI	109	806	508	20,949	1,088	23,460
TOTAL	430	3,005	1,684	76,455	3,905	85,479

1/ Preliminary.

OWN MOTION AND REOPENING DISPOSITIONS BY PROGRAM 1/
FOR THE MONTH: September 01 - September 30, 1983

PROGRAM	DISPOSITIONS					
	AFFIRMED	REVERSED	DISMISSED	DENIED	REMAND	TOTAL
RSI	-	5	-	-	-	5
DI/DWIB	4	68	1	4	89	166
HI	-	-	-	-	-	-
BL	-	-	-	-	-	-
SSI ONLY	-	1	-	1	2	4
CONCURRENT TITLE II/ TITLE XVI SSI	-	14	-	4	29	47
TOTAL	4	88	1	9	120	222

CUMULATIVE: October 01, 1982 - September 30, 1983 1/

PROGRAM	DISPOSITIONS					
	AFFIRMED	REVERSED	DISMISSED	DENIED	REMAND	TOTAL
RSI	5	31	1	2	6	45
DI/DWIB	66	1,131	10	59	794	2,060
HI	-	-	1	-	2	3
BL	-	-	-	1	-	1
SSI ONLY	6	53	3	13	26	101
CONCURRENT TITLE II/ TITLE XVI SSI	30	268	1	19	190	508
TOTAL	107	1,483	16	94	1,018	2,718

1/ Preliminary.

Office of Appeals Operations Performance and Staffing Report 1/

	Requests for Review					Bellmon Review					Total Cases					Average Analysts on Duty	Average Dispositions Per Analyst
	Receipts		Dispositions		Pending (End of)	Receipts		Dispositions		Pending (End of)	Receipts		Dispositions		Pending (End of)		
	Mo.	Cum	Mo.	Cum		Mo.	Cum	Mo.	Cum		Mo.	Cum	Mo.	Cum			
FY 1983																	
October	6670	6670	6604	6604	6077	1432	1432	1136	1136	994	8102	8102	7740	7740	7071	250	37.6
November	7172	13842	6500	13104	6719	1697	3129	1695	2831	987	8869	16971	8195	15935	7706	250	37.1
December	6562	20404	5639	18743	6615	1456	4585	1495	4326	1153	8018	24989	7134	23069	7768	273	28.9
1st Qtr.	20404	20404	18743	18743	6615	4585	4585	4326	4326	1153	24989	24989	23069	23069	7768	258	103.6
January	8492	28896	8483	27226	6497	1796	6381	1804	6130	1276	10288	35277	10287	33356	7773	281	39.6
February	8476	37372	7724	34950	6727	1754	8135	1478	7608	1515	10230	45507	9202	42558	8242	294	36.7
March	10009	47381	10367	45317	6357	1808	9943	1823	9431	1476	11817	57324	12190	54748	7833	293	46.7
2nd Qtr.	26977	47381	26574	45317	6357	5358	9943	5105	9431	1476	32335	57324	31679	54748	7833	289	123.0
April	7983	55364	9068	54385	5680	1397	11340	1492	10923	1397	9380	66704	10560	65308	7077	303	34.9
May	7095	62459	8637	63022	4807	2230	13570	3277	14200	1703	10135	76839	11914	77222	6510	303	39.3
June	9533	71992	9930	72952	6440	2008	15578	2005	16205	1706	11541	88380	11935	89157	8146	301	39.7
3rd Qtr.	24611	71992	27635	72952	6440	5635	15578	6774	16205	1706	31056	88380	34409	89157	8146	302	110.0
July	8418	80410	9585	82537	5339	1749	17327	1789	17994	1157	10167	98547	11374	100531	6495	302	37.7
August	8239	88649	10188	92725	4299	2025	19352	2297	20291	1608	10264	108811	12485	113016	5907	304	41.1
September	8329	96978	8380	101105	6940	2628	21980	2628	21980	1775	10987	119798	11008	124024	8715	292	37.7
4th Qtr.																	

1/ Does not include DCA.

AVERAGE PROCESSING TIMES BY PROGRAM
FOR THE MONTH: September 01 - September 30, 1983 1/

	ALL CASES		BLACK LUNG		DISABILITY		RETIREMENT AND SURVIVORS INSURANCE		HEALTH INSURANCE		SSI ONLY		SSI CONCURRENT	
	SEPT 83	SEPT 82	SEPT 83	SEPT 82	SEPT 83	SEPT 82	SEPT 83	SEPT 82	SEPT 83	SEPT 82	SEPT 83	SEPT 82	SEPT 83	SEPT 82
FROM REQUEST FOR REVIEW FILED TO:														
DISPOSITIONS	85	NA	-	NA	87	NA	79	NA	100	NA	85	NA	80	NA
DENIAL	79	NA	-	NA	82	NA	70	NA	95	NA	81	NA	72	NA
DECISION	165	NA	-	NA	165	NA	155	NA	190	NA	124	NA	180	NA
REMAND	105	NA	-	NA	95	NA	118	NA	132	NA	121	NA	116	NA
DISMISSAL	132	NA	-	NA	132	NA	187	NA	-	NA	120	NA	136	NA
AGE OF PENDING	243	NA	4,415	NA	183	NA	464	NA	186	NA	394	NA	283	NA

COMPLIANCE WITH TIME LIMIT REGULATIONS 2/

TOTAL NO. APPEALS COUNCIL DISPOSITIONS	DISPOSITIONS NOT IN COMPLIANCE		DISPOSITIONS WHERE EXCLUSIONS APPLIED	
	NUMBER	PERCENT	NUMBER	PERCENT
7,191	1,407	19.6%	7	0.1%

1/ Own motion cases are included in the calculation of FY 83 processing times. Lag time between the claim file receipt date and the AC disposition date is used in the calculation.

2/ From Case Control System; based on 90/30 day regulations.

CIVIL ACTIONS WORKLOADS
NEW COURT CASES TO DCA

	OPENING PENDING	RECEIPTS	DISPOSITIONS	CLOSING PENDING
September 1983	6,036	2,541	2,147	6,430
Fiscal Year to Date	2,016	22,725	18,311	6,430

Cases pending in U.S. Courts including OCSE cases for September
1/ SOURCE: SSA Monthly Litigation Report.

COURT REMANDS TO DCA

	OPENING PENDING	RECEIPTS	DISPOSITIONS	CLOSING PENDING*
September 1983	4,561	546	381	4,726
Fiscal Year to Date	3,397	5,079	3,750	4,726

* Includes court remands pending in the hearing offices.

COMPLIANCE WITH TIME LIMIT REGULATIONS*

TOTAL NUMBER OF DECISIONS/REMANDS ISSUED BY AC	NOT IN COMPLIANCE		EXCLUSIONS APPLIED	
	NUMBER	PERCENT	NUMBER	PERCENT
413	126	30.5%	54	13.1%

TOTAL NUMBER OF DECISIONS ISSUED AFTER RECOMMENDED DECISIONS	NOT IN COMPLIANCE		EXCLUSIONS APPLIED	
	NUMBER	PERCENT	NUMBER	PERCENT
322	139	43.2%	47	14.6%

HEARINGS HELD BY ALJS**			DECISIONS ISSUED BY ALJS**				
	NOT IN COMPLIANCE			NOT IN COMPLIANCE		EXCLUSIONS APPLIED	
TOTAL	NUMBER	PERCENT	TOTAL	NUMBER	PERCENT	NUMBER	PERCENT
287	135	47.0%	338	217	64.2%	83	24.6%

Based on numbers from the operating branches.
* Beginning January 1981 compliance and non-compliance is reported based upon the revised regulations for the AC.
** Based on 90/30 day regulations.

DISABILITY WORKLOAD TREND 1/
NATIONAL

	INITIAL CLAIMS			RECONSIDERED CLAIMS			HEARING REQUESTS	
	Processed 3/	Denied	Denial Rate	Processed 3/	Denied	Denial Rate	Filed 2/	Filing Rate
FY 75	---------	---------	-----	369,506	260,864	70.6%	135,202	51.8%
FY 76	1,819,261	757,485	41.6%	360,563	255,933	72.3%	143,196	56.0%
FY 77	1,731,969	856,290	49.4%	354,418	263,718	74.4%	171,325	65.0%
FY 78	1,613,457	860,608	53.3%	352,067	274,680	78.0%	184,479	67.2%
FY 79	1,648,276	949,282	57.6%	383,318	308,284	80.4%	210,465	68.3%
FY 80	1,695,906	1,024,302	60.4%	420,816	345,819	82.2%	239,171	69.2%
FY 81	1,602,809	1,007,640	62.9%	455,667	382,379	83.9%	269,937	70.6%
FY 82	1,429,734	930,482	65.1%	503,493	413,162	82.1%	305,678	74.0%
FY 83 Estimates 4/								
Ongoing	1,394,120	913,110	65.5%	387,175	334,132	86.3%	240,472	72.0%
CDRs	640,000	249,872	39.0%	92,000	77,648	84.4%	90,200	5/

1/ Includes title II, title XVI, and concurrent disability claims.
2/ Excludes Appeals Council and court remands and reinstatements.
3/ Source: State Agency Operations Report. Data includes only State Agency claims processed and denied and does not include district office technical denials. Data from SAOR report was adjusted to correct the double counting of concurrent DI/SSI cases. Because of this adjustment, denial rates should be viewed as close approximations.
4/ FY 83 estimates are as of March 29, 1983.
5/ Only DI CDRs go through the reconsideration process; the hearing filing rate is 64.3 percent (49,900). The DI-SSI and SSI CDRs do not go through the reconsideration process; the hearing filing rate is 46.2 percent (DI-SSI CDRs 8,600; SSI CDRs 31,700).

OHA STAFFING
AS OF: September 30, 1983

Region	Full-Time Permanent							Support Staff Ratio	"All Other" FTE[3]	Stay-In-School Summer Aids
	ALJ	Decision Writers	All Other Support	Interpreter	Total	Authorized Staff	Difference			
I	34	32	114	-	180	193	-13	4.2	17.2	10
II	110	125	391	16	642	649	-7	4.6	11.0	28
III	85	89	321	-	495	496	-1	4.8	14.8	8
IV	147	152	607	2	908	923	-15	5.1	21.6	21
V	141	137	510	-	788	796	-8	4.5	19.6	17
VI	81	77	318	-	476	470	6	4.8	3.0	14
VII	28	28	113	-	169	173	-4	5.0	2.8	7
VIII	16	13	56	-	85	91	-6	4.3	3.1	7
IX	97	88	369	1	555	564	-9	4.7	21.7	29
X	18	9	75	-	102	106	-4	4.6	2.8	5
National Hearing Office	4	2	9	-	15	18	-3	2.7	-	-
Sub - Total	761	752	2,883	19	4,415	4,479	-64	4.7	117.6	146
ORCALJ	10	40	195	7	252	266	-14	-	8.8	23
Total Field	771	792	3,078	26	4,667	4,745	-78	-	126.4	169
CENTRAL OFFICE -										
Ofc Assoc Commissioner[1]					22	31	-9	-	3.1	1
Equal Opportunity Staff					7	7	-	-	-	1
Ofc Chief Admin Law Judge					26	18	8	-	-	1
Ofc Policy Procedures					33	34	-1	-	1.0	2
Appeals Council[2]					84	82	2	-	2.1	2
Ofc Appeals Operations					614	593	21	-	6.3	13
Ofc Mgmt Services					317	325	-8	-	8.7	2
Ofce Appraisal					29	31	-2	-	.6	1
Ofc Field Administration[4]					67	47	20	-	2.0	-
Total Central Office					1,199	1,168	31	-	23.8	23
Total OHA					5,866	5,913	-47	-	150.2	192

1/ Includes Immediate Office of the Associate Commissioner, Executive Secretary and Special Counsel
2/ Includes Vocational Consultant Program Staff
3/ FTE = Full-Time Equivalent (Temporaries, Part-Time, WAE)
4/ Includes GRP
5/ Will be adjusted to new ceiling of 5,890.

Note: Excludes employees on LWOP in excess of 30 days.

82-1371

II/II A

CASE FILE COPY

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Social Security Administration

20 CFR Parts 404 and 416

Administrative Appeals Process Under Title II and Title XVI of the Social Security Act; Time Limitations for Issuing Hearing Decisions and Actions by the Appeals Council

AGENCY : Social Security Administration, HHS

LODGING

ACTION : Final Rule

SUMMARY: These final regulations revise the regulations on the administrative appeals process under title II (Federal Old-Age, Survivors and Disability Insurance) and title XVI (Supplemental Security Income for the Aged, Blind and Disabled) of the Social Security Act to provide specific time limits within which (1) a hearing decision will be issued after a hearing request is filed, and (2) the Appeals Council will act (a) in response to a request for review of a hearing decision or dismissal, (b) after taking own motion review of a hearing decision or dismissal, or (c) pursuant to remand by a Federal court.

These changes will also affect rules for proceedings with respect to entitlement of claimants to, and amounts in controversy of, hospital insurance benefits under title XVIII, Part A, and enrollments and termination of enrollment for supplementary medical insurance benefits under title XVIII, Part B. For the Medicare program the Office of Hearings and Appeals will therefore apply the time limits to hearings and Appeals Council actions affecting those matters and, in addition, will apply those time limits to hearings and Appeals Council actions involving (1) the amount of health payments under title XVIII, Part

Exh. A to Def't's Opposition to Plt's' Motion for Order Compelling Discovery and Motion to Direct Entry of Final Judgment (Oct. 22, 1980)

A and (2) claimant appeals from Professional Standards Review Organization's determinations under section 1159.

Under these final regulations, a hearing decision will be issued within 165 days after a request for hearing is filed. The Appeals Council will be required to take a specific action within 90 days after a request for review is filed. Where the Appeals Council reviews a hearing decision or dismissal on its own motion subsequent action will be taken by the Appeals Council within 30 days of the expiration of the period for claimant comments or submission of additional evidence, as provided in the notice to the claimant of the proposed action. Time periods are also provided for taking action on court remands. Specific time extensions are provided which are discussed under Supplemental Information.

The Notice of Proposed Rule Making (NPRM) containing proposed regulations providing time limitations for actions at the hearings and Appeals Council levels was published in the Federal Register on Feb. 27, 1980 (45 FR 12837) with a 60 day comment period.

DATES: The amendments are effective for (1) hearing requests and requests for Appeals Council review filed, (2) Appeals Council remands issued and court remands received, and (3) Appeals Council reviews on its own motion, after the date the final regulations are published in the Federal Register.

FOR FURTHER INFORMATION CONTACT: Robert Stearn, Policy Analyst, Division of Program Development; Office of Hearings and Appeals; Room 106, Webb Building; 4040 N. Fairfax Drive; Arlington, Virginia 22203; (703) 235-

8520.

SUPPLEMENTARY INFORMATION:

Introduction

Over the last several years concern has been expressed by the general public, representatives of individuals in social security matters, the Congress, and the courts over delays in holding social security hearings, issuing hearing decisions and the reviews of the decisions. As a result we have taken a number of administrative and managerial steps in an effort to control the backlog and improve our service to the public. Specifically, we have increased the number of Administrative Law Judges (ALJs) from 478 in fiscal year 1974 to 629 in fiscal year 1978 and to 690 at present, including a new class about to enter on duty, and are recruiting for more; as a new resource, we have added 400 staff attorneys to provide professional assistance to the ALJs; we have assigned central office analysts to assist the ALJs; and we have provided additional clerical employees in the hearing offices. Also, we have upgraded equipment in the hearing offices to expedite issuing decisions. In addition, we are working to improve our case control system to provide better management control of the caseload.

The overall impact of these initiatives is that ALJ dispositions have increased on the average per ALJ from 17 per month in fiscal year 1976 to 31 by May 1980, a record high in decision productivity. As a result of the steps we have taken, we have also decreased the delays which previously occurred before a hearing is held or a hearing decision is

issued from over 200 days in fiscal year 1976 to approximately 150 days in the current fiscal year. Also we are expediting claimants' requests for Appeals Council review of the hearing decisions, reducing average processing time from 72 days in fiscal year 1979 to 65 days in fiscal year 1980.

Despite these improvements we can expect the time between the receipt of a request for hearing and a final decision to increase because of record receipts of hearing requests and a resultant increase in pending cases. However, in order to assure the public that there will not be unnecessary delays in issuing hearing decisions and Appeals Council reviews, we are establishing by regulation, specific time limits for the issuance of hearing decisions and reviews by the Appeals Council.

This concept of having specific time limits has been endorsed by the Administrative Conference of the United States. The Administrative Conference recommended that "each affected agency adopt time limits or guidelines for the prompt disposition of its adjudicatory . . . actions, either by announcing schedules for particular agency proceedings or by adopting regulations that contain general timetables for dealing with categories of the agency's proceedings." The Administrative Conference believes that timetables or deadlines established by individual agencies to govern their own proceedings can be useful tools for reducing delays and are preferable to more rigid statutory time limits. Also, Congress has required the Secretary to submit a report to Congress recommending appropriate time limits for various levels of adjudication (the Social Security Disability Amendments of 1980; P.L. 96-265).

Some courts have issued decisions or orders mandating that hearings and other actions be held or completed within specific time limits. The court orders differ as to the specific time limits mandated and the types of cases covered. Compliance with these orders sometimes requires us to direct our staff to the jurisdiction affected and this decreases our staff available elsewhere, often with an adverse impact on other claimants. In a national program there should be a uniform level of service to the public. Thus, we believe that uniform time periods for issuing hearing decisions, and reviewing decisions, will increase the efficiency of the administrative appeals process.

Currently, under title II and title XVIII of the Social Security Act, there are no specific time limits within which a hearing must be held or a decision issued. The existing regulation provides only that an Administrative Law Judge shall issue a decision as soon as practicable after the close of a hearing. Similarly there are no specific time limits within which the Appeals Council must act on an individual's request for review of a hearing decision or dismissal of a request for hearing, or when the Appeals Council reviews on its own motion.

Under title XVI of the Social Security Act, there is a statutory requirement that a hearing be held and a decision be issued within 90 days after a hearing is requested in cases involving nondisability issues. This requirement is set out in current regulations as well as provisions for situations in which delays occur. (See 20 CFR 416.1455). These provisions will not be affected by the proposed regulations.

Title XVI does not provide specific time limits within which a hearing must be held and decision issued in disability cases. The regulations require only that the Administrative Law Judge shall issue a decision as soon as practicable after the close of a hearing. (See 20 CFR 416.1457.) There are no specific time limits set out in the regulations within which the Appeals Council must act on an individual's request for review of a hearing decision or dismissal in either a disability or nondisability case, or when the Appeals Council reviews on its own motion.

The NPRM was issued after having been reviewed by the United States District Court for the Western District of Kentucky in Blankenship v. Secretary of HEW, Civil No. C75-0185-L(A), a proceeding in Kentucky in which the timeliness of SSA hearings was at issue.

The NPRM would have basically required that a hearing be held within 90 days after a request for hearing is made and that a hearing decision be issued within 30 days after the hearing was held and the record closed. Under the proposed regulations, the Appeals Council had 90 days to take a specific action after a request for review was filed or own motion review taken. Time limits were also provided for taking actions in cases remanded by the courts. The proposed regulations also provided specific exceptions in situations where there is a need for additional evidence to be obtained and for other reasons, such as for the claimant not being available for the scheduled hearing, for the claimant to have additional time to file a brief, or for reassignment of a case because of the death or extended illness of the ALJ.

Although the proposed regulations were published as an NPRM, the Secretary ordered SSA to begin immediately to use the time limits specified in the NPRM, to determine the degree of compliance SSA could achieve. The Blankenship court, in reviewing the NPRM, stated, that "in the event that any adjustments to the proposed regulations are found necessary . . . as a result of experience under the experimental implementation of those proposed regulations, the defendants shall inform the Court of such adjustments and the reasons therefor."

Thus, when the NPRM was published it was recognized by the Secretary and the court that changes in the time limits might be required based on SSA's actual experience operating under them.

We began operating under the time limits on October 1, 1979. Our experience during the first half of calendar year 1980 demonstrated that we could provide hearings within the time limits in the NPRM in approximately 70 percent of the cases and issue decisions in approximately 80 percent of the cases. It also became apparent that with our increasing workload, we would be in compliance in a decreasing percentage of the cases.

At the time the proposed regulations were submitted for court approval, there were approximately 88,000 hearing requests pending. While increased hearing filings were beginning to materialize, there was no basis for concluding that the increase would continue. Previously there was a pattern of a stabilizing hearing workload. Thus, when the NPRM was submitted to the Blankenship court for its review and approval,

there was a reasonable expectation that we could comply with the proposed time limitations. Subsequently, the number of requests for hearing received continued to increase substantially. To illustrate, the incoming receipts during the first nine months of fiscal year 1980 were as follows:

October	21,236	February	19,618	June	20,742
November	19,018	March	20,707		
December	17,286	April	20,734		
January	20,938	May	21,721		

During the first 9 months of fiscal year 1979, average monthly receipts were approximately 18,000.

This reflects a sharply rising increase in the workload. By July 1980 over 103,000 hearing requests were pending, and July receipts were 22,000, a record high. It is estimated that 263,000 hearing requests will be filed in FY 1981 (a monthly average of 22,000). The estimate for FY 1980 was 238,500 hearing filing or a monthly average of 19,900. In the first 9 months of FY 80 183,826 hearing requests were filed; a monthly average of 20,425, as compared with average monthly receipts of approximately 18,000 hearing requests in fiscal year 1979.

Based on operating experience over the last year and the present size of the Administrative Law Judge corps, we have the capability of disposing of approximately 20,000 hearing requests per month. Thus, considering the current pending workload, which results in delay before the ALJ is able to act on the request, it takes approximately 160 days for a hearing request to get through the current process. Also, as

we mentioned, receipt of hearing requests is continuing at a high level, and fairness to claimants requires that cases received first be acted on before claims received later. In addition, the recent enactment of disability legislation (P.L. 96-265) will likely further increase hearing receipts significantly. The legislation requires the Secretary to (1) review a specific percentage of State Agency disability allowances prior to payment and (2) with some exceptions, review disability cases at least once every three years. With the hearing workload on hand, the average decision time will be approximately 160 days, at least 40 days in excess of the combined 90 days for scheduling of hearings and 30 days for issuing decisions as provided in the NPRM.

However, while the Administrative Law Judge corps has significantly increased its productivity (ALJ average dispositions have increased from 27 per month in FY 1979 to 31 in May-July 1980), and some limited additional increases are expected in the future, the increased filings of hearing requests have exceeded our production capability. Between October 1, 1979 and July 1, 1980, we have appointed 68 new Administrative Law Judges and 31 have terminated their appointments. This leaves a net increase of 37 Administrative Law Judges. (The ALJs appointed during this period were the maximum number we were able to appoint from the limited Office of Personnel Management (OPM) ALJ register.) An additional 28 new Administrative Law Judges have been appointed and will enter on duty in September 1980. It takes a new Administrative Law Judge from 6 to 9 months to be fully productive. Even with the increase in Administrative Law Judges on duty, there will not be a sufficient number available to meet the demands of the increasing hearing

filings and to comply with the time limits proposed in the NPRM. While part of the answer to dealing with increasing workloads is to appoint additional Administrative Law Judges, the OPM's Register of Administrative Law Judge candidates is not presently adequate to meet our needs. For example in September 1980 we were authorized to recruit 62 new ALJs. However, due to the limited OPM register, we were able to hire only 28 new ALJs. We have made, and will continue to make, a concerted effort to interest potential candidates to file for the Administrative Law Judge position. However, it will take 6 months or more before the potential candidates will appear on this register. In addition, even if our efforts prove successful, there will still be a 6 to 9 month gap before the new Administrative Law Judges become fully productive. Thus, if we were to adopt the time limits proposed in the NPRM we would be making a commitment to the public which we could not realistically meet.

The primary purpose of the regulation is to inform the public of the degree of service they can expect and generally are entitled to receive. We intend to make a concerted effort to provide hearings and decisions as expeditiously as possible consistent with full development of pertinent facts and accuracy in decision-making. For example, we will closely monitor the workload in the hearing offices and will experiment with various methods of improving administrative law judge utilization of staff attorneys and other support staff as a method of making further increases in productivity.

In addition to hearings and Appeals Council actions under title II and title XVI of the Social Security Act, these time limits will also be

applied to (1) claimants' appeals involving entitlement under the Medicare program, and the amount of health care payments under title XVIII, Part A of the Social Security Act, and (2) appeals by claimants from Professional Standards Review Organizations' determinations under section 1159 of title XI. The time limits will not apply to (1) appeals under section 1869(c) by health care facilities dissatisfied with adverse provider certification determinations, (2) appeals by certain other providers of services (42 CFR 405.1501), and (3) appeals by providers who disagree with the Secretary's refusal to waive the provisions of the Life Safety Code of the National Fire Protection Association (section 1861(j)(13) of the Act).

Basic Rules

In the final regulations we are specifying that a hearing decision will be issued within 165 calendar days of the filing of the request for hearing. This represents approximately 115 workdays. The 165 day time limit will be extended where (1) additional evidence must be secured, (2) a claimant is unable to attend a scheduled hearing, (3) a claimant requests time to secure additional evidence or file a brief, or take some other action pertinent to the claim and (4) a case is reassigned after a hearing has been held due to the unavailability of the Administrative Law Judge who held the hearing. These extensions were addressed in the NPRM. Experience has shown that a single total overall time limit from the date the claimant files a request to a decision on the claim affords advantages to claimants and Administrative Law Judges which are not provided under a separate time limit from the request to the hearing and from the hearing to the decision. The single

time limit will permit Administrative Law Judges more flexibility in conducting their major functions; i.e., holding hearings and issuing decisions. This flexibility will permit the Administrative Law Judges to make the best use of their time, give them the best opportunity to maximize their productivity, and thus expedite their service to the public. A single time limit also simplifies the regulations and will promote better public understanding of SSA's hearing processes. The public is primarily interested in the total time it takes to get a decision after a request for hearing rather than in the time it takes for intermediate steps in the hearing process.

The special provision for time limits for issuing a hearing decision where a hearing is not held has been deleted and these cases will now come under the single time limit. This change will have the effect of treating all claimants equally, i.e., no claimant will be taken out of turn based on the normal and equitable method of handling cases on a first-in first-out basis. However, since a hearing will not be required, it is anticipated that such decisions will be issued in a considerably shorter time than 165 days. Priority will be given by the Administrative Law Judges to cases remanded by the Appeals Council either on the Council's own initiative or pursuant to a court order by virtue of their greater age.

The time limit for issuance of hearing decisions will be reviewed annually. Commencing with December 1981 and each December thereafter we will publish a notice (or where appropriate, an NPRM) in the Federal Register stating the time limit goal for the forthcoming year. SSA

remains committed to providing the most expeditious service practicable while at the same time fulfilling a commitment to assure the accuracy and quality of its decisions and according every claimant a full and fair opportunity to present his case. In a dynamic program with many conditions beyond our control, it would be inadvisable as well as misleading to make future time limit commitments. To illustrate, we cannot predict with accuracy such matters as (1) the effect on hearing filings of the recently enacted 1 80 disability amendments (P.L. 96-265) or of fluctuations in the national economy, (2) availability of candidates for Administrative Law Judge positions, (3) budgetary restrictions, (4) the complexity of future cases, or (5) the impact of future legislation. Thus, an annual review and realistic time limits for each year will insure that the public will have current information about the level of service they can expect. Nevertheless, every effort will be made to achieve a steady reduction in hearing time consistent with fairness to claimants and assuring them an opportunity to fully present their cases.

Experience to date has shown that the proposed time limits for actions at the Appeals Council review level are both desirable and realistic goals. Accordingly, no changes have been made in the final regulations regarding actions by the Appeals Council on review of Administrative Law Judge decisions and dismissals.

With regard to time limits for actions on remands from Federal courts, we have increased by 15 days the period for Appeals Council remands of these cases to Administrative Law Judges and for Appeals Council action on Administrative Law Judges' recommended decisions. Experience

has shown that with time lost in the Appeals Council's receipt of the remand order and time lost in transit between 126 hearing offices throughout the country and the Appeals Council located in Arlington, Virginia, an additional 15 days is needed to insure that proper consideration is given to the issues presented. We have also provided an extension of the time limits where the Appeals Council must seek clarification of a remand order by the court or the Appeals Council seeks appeal of a remand order. Such clarification or appeal shall be requested by the Appeals Council within 30 days after the Secretary receives the remand order.

Other Changes in the Regulations

The NPRM required that if the Administrative Law Judge requested additional evidence prior to the hearing, the request would be made within 45 days of the filing of the request for hearing and the hearing would be held within 30 days of the receipt of the additional evidence. Since the final regulations provide a single time limit from request for hearing to hearing decision, the provision for scheduling the hearing within 30 days of the receipt of the additional evidence is not required. As to requesting additional evidence, the final regulations provide that the time limit shall be extended by the period from the date of the request to the receipt of the evidence. This is similar to the provision in the NPRM. The fact that the length of the extension would be the same regardless of when the evidence is requested, minimizes the need to provide a time limit in which the evidence should be requested. This affords the Administrative Law Judge desired flexibility in handling his or her workload while avoiding any possibility that

any Administrative Law Judge might not request needed evidence where the time specified had past. That possibility could adversely affect a claimant's right to have all relevant evidence considered at the hearing. As a matter of practice, any additional evidence needed will be requested as soon as the case is reviewed and the need is identified.

Although we have generally eliminated intermediate processing times in the final regulation, we have retained the provision for the Administrative Law Judge to request additional evidence after the hearing is held. We have modified this provision to state that the Administrative Law Judge shall request this additional evidence within 30 days of the hearing or within 165 days of the hearing request, whichever is earlier.

The NPRM provided a time limit for the issuance of a decision where no oral hearing was held and for the scheduling of a supplemental hearing. Both provisions are deleted from the final regulation. To the extent feasible as noted earlier, hearing requests are and will be processed in the order in which filed.

If no oral hearing has been requested, the Administrative Law Judge, based on the pending workload, may not reach the case in 90 days (the time limit which was provided in the Notice of Proposed Rule Making for a decision when no oral hearing is held). Until the Administrative Law Judge reviews the case or evidence requested is received, the Administrative Law Judge would not be in a position to decide that a favorable decision could be issued without holding a hearing. Also,

if a hearing on the record is requested, the Administrative Law Judge may not reach the case within the 90-day time limit because cases are handled normally on a first-in first-out basis. For these reasons, it was felt that we should eliminate this special time limit. However, in practice, since no hearing need be held, the on-the-record decision will normally be issued in less time than the 165 days.

With regard to the holding of a supplementary hearing, it was felt that such hearing should be held within the overall 165-day time limit and no extension of time is warranted.

Response to Public Comments

In response to the NPRM we received 44 comments: 37 from legal aid and social service organizations, 3 from administrative law judges, 1 from the Association of Administrative Law Judges and 3 from other members of the public. Generally the public comments were supportive of SSA's efforts to establish time limits for hearing and Appeals Council actions. However, there were a number of suggestions to improve handling of cases under the time limits.

Discussion of Comments

Comment - A number of commenters recommended that if the time limit is not met in a hearing case, payment of benefits should be initiated.

Response - Social security and supplemental security income benefits are payable only to individuals who meet the factors of eligibility specified by law. The Secretary may authorize payment of benefits only

if the eligibility factors specified are met. The Social Security Administration does not have explicit statutory authority to pay benefits until eligibility has been established (though one circuit has directed payments). Thus, SSA could not initiate payment of benefits even if the time limit specified for issuing a hearing decision was not met.

The lack of legal authority to provide benefits in these circumstances reflects the importance and congressional intent that benefits go only to those who are entitled to receive them. In this regard, in about half of the hearing cases, benefits are denied. Payment in time delayed cases would result in the making of substantial overpayments which would be difficult, if not impossible, to recover. This would result in a drain of the trust fund or general revenues and would be contrary to public policy.

Comment - Some commenters felt it takes too much time for SSA to initiate payment of benefits after the hearing decision is issued. A few commenters felt that a time limit should be provided for the initiation of payment of benefits.

Response - We recognize that some delays have occurred in the initiation of payment after a favorable decision. We are aware of this problem and a number of changes in processing and procedures have been made to insure that payment begins as expeditiously as possible. This process is being monitored to insure that delays are kept to a minimum. We do not believe that it is practical to provide in regulations for a time limit within which benefit payments must begin. In some cases additional information must be obtained before the amount of the benefit

can be determined accurately.

Comment - A few commenters felt that the imposition of time limits for actions at the hearing level could result in cases being heard and decisions issued without providing the claimant or his or her representative sufficient time to obtain and present all of the evidence necessary to support the claim.

Response - It was recognized in drafting the time limit regulations that providing rigid time limits which had to be met without exception would work to the disadvantage of the claimant wishing to obtain additional evidence, witnesses or representation. Therefore, the regulations provide for the extension of time granted the claimant/or representative for such purposes as obtaining additional evidence or witnesses, or otherwise preparing the case. In addition, if the Administrative Law Judge believes additional evidence is needed, an extension of the time limits is specifically provided for. Thus, the time limit regulations will not disadvantage a claimant who needs more time to fully prepare his or her case.

Comment - Some commenters felt that the claimant should be provided with general notice of the time limits as well as a specific notice with the reasons and an opportunity to object, any time an action is taken which triggers an extension of time.

Response - Once the time limit regulations become effective, we will provide public information materials on the time limits. Providing notices when an action is being taken which will extend the time limit with opportunity to object, would delay action in the case and the

rendering of the final action. This would be counter to timely service to the public, the purpose of the regulation.

Comment - A number of commenters felt that the provision for an extension of time for "uncontrollable circumstances" was too broad and could result in abuse by SSA.

Response - The final regulations do not include a provision for an extension of time for uncontrollable circumstances, except for the one already in the regulations for title XVI cases (primarily because of the statutory requirement that hearing decisions in nondisability cases be issued within 90 days). With an overall 165 day time limit for issuing a hearing decision, rather than the 90-30 day provisions contained in the NPRM, the Administrative Law Judge will have greater flexibility in handling any unusual or unexpected delays. Also, we feel that rarely would uncontrollable circumstances affect our ability to issue a decision within the time frame. Further, the work and time that would be involved in petitioning the Chief Administrative Law Judge or his or her delegate for extensions would take time away from processing cases.

Comment - Some commenters recommended that we revise the regulations to specify time limits for initial and reconsideration determinations.

Response - We are considering ways in which initial and reconsideration determinations may be improved, including more prompt issuances. If we should determine that time limits comparable to those for cases at the hearing level are appropriate for initial and reconsideration

determinations, we will issue regulations to implement the revisions, and they will be published separately with an NPRM. The NPRM will give members of the public an opportunity to comment on the regulations before they become final.

We also received comments which are not now relevant because of the changes we have made in the final regulation. These comments concerned certain of the intermediate time limits which we have eliminated in order to simplify the rules to better enable the Administrative Law Judge to manage this workload. These changes are discussed in detail in the "other changes" section of the preamble.

Judge to manage this workload. These changes are discussed in detail in the "other changes" section of the preamble.

The amendments set forth below are issued under the authority contained in secs. 205(a), 1102, 1159,1631, 1869 and 1872 of the Social Security Act, as amended (53 Stat. 1368, 49 Stat. 647, as amended 86 Stat. 1439, 86 Stat. 1475, 79 Stat. 330, 79 Stat. 332, 42 U.S.C. 405(a), 1302, 1320c-8, 1383, 1395ff, 1395ii).

(Catalog of Federal Domestic Assistance Program Nos. 13.800 Health Insurance, Aged, Blind, and Disabled--13.802 Social Security--Disability Insurance; 13.803 Social Security--Retirement Insurance; 13.804 Social Security--Special Benefits for Persons Aged 72 and Over; 13.805 Social Security--Survivors' Insurance; 13.807--Supplemental Security Income).

Dated: AUG - 6 1980

William J. Driver
Commissioner of Social Security

Approved: AUG 21 1980

/s/Patricia Roberts Harris
Secretary of Health and Human Services

Chapter III of title 20 of the Code of Federal Regulations is amended as follows:

Part 404--Federal Old-Age, Survivors, and Disability Insurance

1. Following § 404.939, a new § 404.939a is added to read as follows:

§ 404.939a Time Limit for issuing a hearing decision.

The Administrative Law Judge shall issue a hearing decision within 165 calendar days after a request for hearing is filed. Where additional evidence is needed, the claimant is unavailable for the scheduled hearing, claimant requests time to submit additional evidence/or a brief or to prepare for a hearing or to take some additional action with respect to the clain, the time for issuance of the hearing decision shall be extended as set forth below:

(a) Claimant unavailable for hearing.

(1) If a hearing is scheduled and the claimant or his or her representative is not available on that date, the claimant or the representative will notify the Administrative Law Judge when he or she will be available for the hearing. If good cause is established, the Administrative Law Judge shall reschedule and hold the hearing within 45 days after the Administrative Law Judge is informed that the claimant or the representative (if there is one) is available for the hearing, or within 30 days if the claimant is willing to travel to the

hearing office.

(2) If no hearings are scheduled to be held in the area of the claimant's residence within the 45-day period, the hearing shall be scheduled for the next hearing trip the Administrative Law Judge makes to the area of the claimant's residence. The time period for issuing the hearing decision shall be extended by the number of days beginning with the date the hearing was originally scheduled until the date of the new hearing.

(b) Request for additional evidence prior to hearing.

If the Administrative Law Judge requests additional evidence prior to the hearing, the time limit for issuing the hearing decision shall be extended by the number of days from the date the evidence is requested until the date the evidence is received by the Administrative Law Judge.

(c) Claimant requests additional time prior to hearing.

If the claimant requests additional time to submit more evidence, or to obtain witnesses or representation, the time period for issuing the hearing decision shall be extended to cover the additional time granted.

(d) Request for additional evidence after the hearing is held.

If the Administrative Law Judge requests additional evidence, it shall be requested within 30 days of the hearing or within

165 days of the filing of the hearing request, whichever is earlier. The time limit for issuing the hearing decision shall be extended by the number of days from the date the evidence is requested until the period the evidence is obtained, if the evidence is requested from the claimant, or until the period for claimant comment on the evidence has ended, if the evidence is requested from someone else.

(e) Claimant requests additional time after the hearing.

If the claimant wishes to submit additional evidence or written statements of fact or law, the time period for issuing the hearing decision shall be extended to cover the time granted.

(f) Reassignment after a hearing has been held.

If it is necessary to reassign a case to another Administrative Law Judge due to the unavailability of the original Administrative Law Judge (e.g., resignation, retirement, illness), the case shall be promptly reassigned. If a supplemental hearing is not required, the time for issuing the hearing decision shall be extended by the number of days beginning with the date of the hearing until the date of reassignment. If the Administrative Law Judge to whom the case is reassigned determines that another hearing is necessary, the hearing shall be scheduled promptly and the hearing decision shall be issued within 90 days after the date of reassignment.

2. Following § 404.946, new §§ 404.946a and 404.946b

are added to read as follows:

§ 404.946a Time limit for Appeals Council action on request for review.

Within 90 days from the date a request for review is filed, the Appeals Council shall dismiss, deny or grant the request.

§ 404.946b Time limit for Appeals Council action after review is granted.

If the Appeals Council grants a request for review the following time limits apply:

(a) The Appeals Council issues a decision. The Appeals Council shall issue a decision within 30 days after the claimant's reply to the Appeals Council's notice of proposed action is received. The notice of proposed action is sent with th Appeals Council notice granting review. If no reply is received, the Appeals Council shall issue the decision within 30 days after the end of the period for reply.

(b) Additional evidence is needed. (1) If the Appeals Council requests additional evidence, it shall do so within 45 days after it grants the request for review. If after it receives additional evidence the Appeals Council decides to issue a decision (rather than remand the case to an Administrative Law Judge), the decision shall be issued within 30 days after the claimant comments on the evidence. If no comment is received, the decision shall be issued within 30 days after the end of the comment period.

(2) If after the evidence or comments are received, the Appeals

Council determines still further evidence is needed, and then decides to issue a decision (rather than remand the case to an Administrative Law Judge), the decision shall be issued within 30 days after the claimant's comments are received on the additional evidence. If no comments are received, the decision shall be issued within 30 days after the end of the comment period.

(c) Remand to the Administrative Law Judge. If the Appeals Council decides to remand a case to the Administrative Law Judge, the case shall be remanded within 30 days from the date the Appeals Council grants the review. If the Appeals Council requests additional evidence and then decides to remand the case to the Administrative Law Judge, the case shall be remanded within 30 days after the Appeals Council receives the evidence and the claimant's comments, if any.

3. Following § 404.950, new §§ 404.950a through 404.950d are added to read as follows:

§ 404.950a Time limits for issuing hearing decisions in cases remanded by the Appeals Council.

If the Appeals Council remands a case to the Administrative Law Judge (except for cases remanded by a court), the time limits for issuing a hearing decision (including the extensions provided) specified in section 404.939a shall be applicable, except the time limit shall begin as of the date the Appeals Council remands the case to the Administrative Law Judge.

§ 404.930b Time limits for issuing hearing decisions in cases remanded by a court.

If a court remands a case to the Secretary, the following time limits shall apply (except where the court sets other time limits):

(a) Appeals Council issues decision. If the Appeals Council determines that it can issue a decision from the evidence in the record, the decision shall be issued within 30 days after the Secretary receives the court's remand order.

(b) Appeals Council requests additional evidence. If the Appeals Council decides additional evidence is needed, the Appeals Council shall request it within 30 days after the Secretary receives the court's remand order. The Appeals Council shall issue a decision within 30 days after the evidence is entered into the record.

(c) Appeals Council remands case to Administrative Law Judge. If the Appeals Council decides to remand a case to an Administrative Law Judge, it shall do so within 45 days after the Secretary receives the court's remand order. If the Appeals Council remands a case to an Administrative Law Judge for the holding of a hearing/or the issuance of a hearing decision, the time limit specified in 404.939a and extensions thereof shall be applicable, except that the time limit shall begin as of the date the Appeals Council remands the case to the Administrative Law Judge.

(d) Administrative Law Judge returns case with the recommended decision to Appeals Council. The Appeals Council shall issue a decision,

adopting, modifying or rejecting the Administrative Law Judge's recommended decision within 45 days after the expiration of the time period within which the claimant may submit comments. If after receiving the recommended decision issued by the Administrative Law Judge the Appeals Council wishes to obtain additional evidence, the time limits in § 404.946b(b) shall apply, except that the time limit shall begin as of the date the Appeals Council receives the Administrative Law Judge's recommended decision.

(c) Clarification or appeal of remand order. Where clarification of a remand order is required or appeal requested, the Appeals Council shall request such clarification or appeal within 30 days after the Secretary receives the remand order.

§ 404.950c Time limit for action by the Appeals Council if it reviews a hearing decision on its own motion or reopens a decision.

If the Appeals Council reviews a decision on its own motion or reopens a decision it will--

(a) Issue a decision within 30 days after the expiration of the period for comment on the Appeals Council's notice to reopen or take own motion review; or

(b) Request any additional evidence within 45 days of granting the review or reopening a decision and issue its decision within 30 days after the end of the period for receiving comments on any additional evidence the Appeals Council requested; or

(c) Remand the case to the Administrative Law Judge within

30 days after it has notified the claimant that it is reviewing the decision or within 30 days after the receipt of additional evidence. In this case, the time limits in § 404.950a will apply.

§ 404.950d Exceptions to time periods for action by the Appeals Council.

If a claim is pending before the Appeals Council and the claimant requests time to review the record or submit additional evidence or a brief, the time period for action by the Appeals Council will be extended by 30 days or the period of delay, whichever is greater.

PART 416--SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED

4. Section 416.1455 is revised to read as follows:

§ 416.1455 Time limit for issuing a hearing decision in cases not involving the existence of disability.

(a) In cases not involving the existence of a disability, the Administrative Law Judge shall hold a hearing and issue a decision within 90 days after the filing of a request for a hearing. (If the matter in disagreement involves the existence of a disability, see § 416.1455a for the applicable time limits for issuing hearing decisions.)

(b) The Administrative Law Judge may not be able to issue the hearing decision within 90 days in some cases. Therefore, the 90-day time period may be extended for good cause as follows:

(1) Claimant's actions. Where delays are caused by the claimant or his or her representative, the time period for the decision may be

extended by the total number of days involved in the delays. Examples of delays include, but are not limited to:

The claimant's delay, or the delay of any other party in giving evidence, submitting briefs or other statements, and postponements or adjournment of the hearing at the claimant's request or the request of any other party.

(2) Other delays. Where delays occur through no fault of the Secretary (e.g., acts of God), these facts will be considered good cause for extending the time period for issuing the decision, and the decision will be issued as soon thereafter as practicable.

5. After § 416.1455, a new § 416.1455a is added to read as follows:

§ 416.1455a Time limit for issuing a hearing decision in disability cases.

The Administrative Law Judge shall issue a hearing decision within 165 calendar days after a request for hearing is filed. Where additional evidence is needed, the claimant is unavailable for the scheduled hearing, the claimant requests time to submit additional evidence and/or a brief or to prepare for a hearing or take some additional action with respect to the claim, the time for issuance of the hearing decision shall be extended as set forth below:

(a) Claimant unavailable for hearing. (1) If a hearing is scheduled and the claimant or his or her representative is not available

on that date, the claimant or the representative will notify the Administrative Law Judge when he or she will be available for the hearing. If good cause is established the Administrative Law Judge shall reschedule and hold the hearing within 45 days after the Administrative Law Judge is informed that the claimant or the representative (if there is one) is available for the hearing or within 30 days if the claimant is willing to travel to the hearing office.

(2) If no hearings are scheduled to be held in the area of the claimant's residence within the 45-day period, the hearing shall be scheduled for the next hearing trip the Administrative Law Judge makes to the area of the claimant's residence. The time period for issuing the hearing decision shall be extended by the number of days beginning with the date the hearing was originally scheduled until the date of the new hearing.

(b) Request for additional evidence prior to hearing. If the Administrative Law Judge requests additional evidence prior to the hearing, the time limit for issuing the hearing decision shall be extended by the number of days from the date the evidence is requested until the date the evidence is received by the Administrative Law Judge.

(c) Claimant requests additional time prior to hearing. If the claimant requests additional time to submit more evidence, or to obtain witnesses or representation, the time period for issuing the hearing decision shall be extended to cover the additional time granted.

(d) Request for additional evidence after the hearing is held. If the Administrative Law Judge requests additional evidence, it shall

be requested within 30 days of the hearing or within 165 days of the filing of the hearing request, whichever is earlier. The time limit for issuing the hearing decision shall be extended by the number of days from the date the evidence is requested until the period the evidence is obtained, if the evidence is requested from the claimant, or until the period for claimant comment on the evidence has ended, if the evidence is requested from someone else.

(e) Claimant requests additional time after the hearing. If the claimant wishes to submit additional evidence or written statements of fact or law, the time period for issuing the hearing decision shall be extended to cover the time granted.

(f) Reassignment after a hearing has been held. If it is necessary to reassign a case to another Administrative Law Judge due to the unavailability of the original Administrative Law Judge (e.g., resignation, retirement, illness), the case shall be promptly reassigned. If a supplemental hearing is not required, the time for issuing the hearing decision shall be extended by the number of days beginning with the date of the hearing until the date of reassignment. If the Administrative Law Judge to whom the case is reassigned determines that another hearing is necessary, the hearing shall be scheduled promptly and the hearing decision shall be issued within 90 days after the date of reassignment.

6. Following § 416.1464, new §§ 416.1464a and 416.1464b are added to read as follows:

§ 416.1464a Time limit for Appeals Council action on request for review.

Within 90 days from the date a request for review is filed, the Appeals Council shall dismiss, deny or grant the request.

§ 416.1464b Time limit for Appeals Council action after review is granted.

If the Appeals Council grants a request for review the following time limits apply:

(a) The Appeals Council issues a decision. The Appeals Council shall issue a decision within 30 days after the claimant's reply to the Appeals Council's notice of proposed action is received. The notice of proposed action is sent with the Appeals Council notice granting review. If no reply is received, the Appeals Council shall issue the decision within 30 days after the end of the period for reply.

(b) Additional evidence is needed. (1) If the Appeals Council requests additional evidence, it shall do so within 45 days after it grants the request for review. If after it receives additional evidence the Appeals Council decides to issue a decision (rather than remand the case to an Administrative Law Judge), the decision shall be issued within 30 days after the claimant comments on the evidence. If no comment is received, the decision shall be issued within 30 days after the end of the comment period.

(2) If after the evidence or comments are received, the Appeals Council determines further evidence is needed, and then decides to issue a decision (rather than remand the case to an Administrative Law

Judge), the decision shall be issued within 30 days after the claimant's comments are received on the additional evidence. If no comments are received, the decision shall be issued within 30 days after the end of the comment period.

(c) Remand to the Administrative Law Judge. If the Appeals Council decides to remand a case to the Administrative Law Judge, the case shall be remanded within 30 days from the date the Appeals Council grants the review. If the Appeals Council requests additional evidence and then decides to remand the case to the Administrative Law Judge, the case shall be remanded within 30 days after the Appeals Council receives the evidence and the claimant's comments, if any.

7. Following § 416.1467, new §§ 416.1467a through 416.1467d are added to read as follows:

§ 416.1467a Time limits for issuing hearing decisions in cases remanded by the Appeals Council.

If the Appeals Council remands a case to the Administrative Law Judge (except for cases remanded by a court), the time limits for issuing a hearing decision (including the extensions provided) specified in section 416.1455a shall be applicable, except the time limit shall begin as of the date the Appeals Council remands the case to the Administrative Law Judge.

§ 416.1467b Time limits for issuing hearing decisions in cases remanded by a court.

If a court remands a case to the Secretary, the following time

limits shall apply (except where the court sets other time limits):

(a) Appeals Council issues decision. If the Appeals Council determines that it can issue a decision from the evidence in the record, the decision shall be issued within 30 days after the Secretary receives the court's remand order.

(b) Appeals Council requests additional evidence. If the Appeals Council decides additional evidence is needed, the Appeals Council shall request it within 30 days after the Secretary receives the court's remand order. The Appeals Council shall issue a decision within 30 days after the evidence is entered into the record.

(c) Appeals Council remands case to Administrative Law Judge. If the Appeals Council decides to remand a case to an Administrative Law Judge, it shall do so within 45 days after the Secretary receives the court's remand order. If the Appeals Council remands a case to an Administrative Law Judge for the holding of a hearing or the issuance of a hearing decision, the time limit specified in section 416.1455a and extensions thereof shall be applicable, except that the time limit shall begin as of the date the Appeals Council remands the case to the Administrative Law Judge.

(d) Administrative Law Judge returns case with the recommended decision to Appeals Council. The Appeals Council shall issue a decision, adopting, modifying or rejecting the Administrative Law Judge's recommended decision within 45 days after the expiration of the time period within which the claimant may submit comments. If after receiving the recommended decision issued by the Administrative Law Judge the

Appeals Council wishes to obtain additional evidence, the time limits in § 416.1464b(b) shall apply, except that the time limit shall begin as of the date the Appeals Council receives the Administrative Law Judge's recommended decision.

(e) Clarification or appeal of remand order. Where clarification of a remand order is required or appeal requested, the Appeals Council shall request such clarification or appeal within 30 days after the Secretary receives the remand order. /

§ 416.1467c Time limit for action by the Appeals Council if it reviews a hearing decision on its own motion or reopens a decision.

If the Appeals Council reviews a decision on its own motion or reopens a decision it will--

(a) Issue a decision within 30 days after the expiration of the period for comment on the Appeals Council's notice to reopen or take own motion review; or

(b) Request any additional evidence within 45 days of granting the review or reopening a decision and issue its decision within 30 days after the end of the period for receiving comments on any additional evidence the Appeals Council requested; or

(c) Remand the case to the Administrative Law Judge within 30 days after it has notified the claimant that it is reviewing the decision or within 30 days after the receipt of additional evidence. In this case, the time limits in 416.1467a will apply.

§ 416.1467d Exceptions to time periods for action by the Appeals Council.

If a claim is pending before the Appeals Council and the claimant requests time to review the record or submit additional evidence or a brief, the time period for action by the Appeals Council will be extended by 30 days or the period of delay, whichever is greater.

Office Supreme Court, U.S.
F I L E D
AUG 10 1983
CLERK

No. 82-1371

In the Supreme Court of the United States

OCTOBER TERM, 1983

MARGARET M. HECKLER,
SECRETARY OF HEALTH AND HUMAN SERVICES,
Petitioner

v.

LEON S. DAY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED FEBRUARY 14, 1983
CERTIORARI GRANTED APRIL 25, 1983

TABLE OF CONTENTS *

	Page
Docket Entries, United States District Court for the District of Vermont	1
Docket Entries, United States Court of Appeals for the Second Circuit	14
Affidavit To Accompany Application To Proceed In Forma Pauperis	17
Amended Complaint and Exhibits 2 and 3	19
Motion Of Amedie Maurais To Intervene As Party Plaintiff	29
Defendant's Answers To Plaintiff's Interrogatories	38
Answer To Verified Complaint Of Intervening Plaintiff Amedie Maurais	68
Answer To Amended Complaint	71
Supplement To Defendant's Answers To Plaintiff's Interrogatories	75
District Court Opinion and Order Granting Class Certification, (June 15, 1979)	80
Second Supplement To Defendant's Answer To Plaintiff's Interrogatory 9	86
Defendant's Answer To Plaintiff's Second Interrogatories	90
District Court Memorandum Of Decision Denying Summary Judgment, (July 14, 1980)	96
District Court Memorandum Of Decision Granting Preliminary Injunction, (Jan. 12, 1981)	101
Defendant's Answers to Plaintiffs' Third Set Of Interrogatories	105

* The opinions of the Court of Appeals and the district court appear in the appendix to the petition for a writ of certiorari and have not been reproduced.

Page

Decision of Appeals Council, Department of Health, Education, and Welfare, *Leon S. Day* (Sept. 12, 1980) 150

Defendant's Answers And Objections To Plaintiffs' Third Interrogatories And Requests For Admissions.. 151

Declaration Of Theodore S. Allen 161

Defendant's Plan for Implementing the Court's Judgment of November 6, 1981 (filed Jan. 4, 1982) 196

Order allowing certiorari 207

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Civil Action No. 78-266

LEON S. DAY, ET AL.

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION and WELFARE

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1978		
Nov. 15	1	Filed Plaintiff's Application to Proceed in Forma Pauperis.
Nov. 15	2	Filed Plaintiff's Affidavit to Accompany Application to Proceed in Forma Pauperis.
Nov. 15	3	Filed Plaintiff's Application for Temporary Restraining Order.
Nov. 15	4	Filed Plaintiff's Memorandum in Support of Injunctive Relief. cp
Nov. 15	5	Filed Certificate of Service. cp
Nov. 24	6	Filed Order granting in forma pauperis application. lgl/cb
Nov. 24	7	Filed Plaintiff's request for withdrawal of Application of T.R.O. rar
Nov. 24	8	Filed Amended Complaint-Class Action. rar
Nov. 24	9	Filed Plaintiff's Interrogatories. rar
Nov. 27	10	Filed Complaint—Class Action.
Nov. 27		Issued Summons, rer

DATE	NR.	PROCEEDINGS
1978		
Dec. 1	11	Filed Motion of Amedie Maurais to Intervene as Party Plaintiff.
Dec. 1	12	Filed Memorandum in Support of Motion to Intervene.
Dec. 1	13	Filed Verified Complaint of Intervening Plaintiff Amedie Maurais. cp
Dec. 4		Received and attached a copy of Intervenor Maurais' request for reconsideration, Exhibit #4, to the Complaint. (#13) cp
Dec. 5	14	Filed Summons; returned served. cp
Dec. 14	15	Filed Defendant's Memorandum in Opposition to Motion of Amedie Maurais to Intervene as Party Plaintiff. (P#11) cp
Dec. 19	16	Filed Intervenor, Amedie Maurais', Reply Memorandum in Support of Motion to Intervene. cp
1979		
Jan. 25	17	Filed Defendant's Answers to Plaintiff's Interrogatories filed Nov. 24, 1978, P#9. cp
Jan. 31	18	Filed Defendant's Motion for Enlargement of Time to Answer or Move with Memorandum of Law in Support. cp
Feb. 5		In open Court before Judge Holden. Ronald Lospennato, Esq., for plt Peter Hall, AUSA.
Feb. 5		Hearing on Motion of Amedie Maurais to Intervene as Party Plaintiff.
Feb. 5		Statements made to the Court by Mr. Lospennato for proposed intervene followed by Mr. Hall.
Feb. 5		ORDERED: Motion granted.

DATE	NR.	PROCEEDINGS
1979		
Feb. 5		Hearing on Government's Motion for Enlargement of Time.
Feb. 5		The plaintiff having consented thereto, it is ORDERED: Motion granted.
Feb. 5		Case to be set for class action certification. lgl
Feb. 5	19	Filed Notice of Appearance of Anne M. Gulyassy, Esq. for defendant. gjl
Feb. 5	20	Filed ORDER—that the defendant's Motion be and hereby is granted (Motion for Enlargement of Time to Answer or Move) and an enlargement of time to answer or move be and is hereby granted until 10 days after service of this Court's order allowing or denying the pending Motion to Intevene of Amedie Maurais. Mailed copy to attorneys. cp 2-8
Feb. 13	21	Filed Pltfs' Motion for Class Certification.
Feb. 13	22	Filed Memo in Support of Motion for Class Certification. gjl
Feb. 16	23	Filed Supplement to Defendant's Answers to Plaintiff's Interrogatories.
Feb. 23	24	Filed Government's Answer to Amended Complaint.
Feb. 23	25	Filed Government's Answer to Verified Complaint of Intervening Plaintiff, Amedie Maurais. (#P13) cp
Feb. 27	26	Filed ORDER—that defendant's time to file his Opposition to Class Certification be and is hereby extended to and including 2/28/79 (Copies mailed to Attorneys).
Mar. 8	27	Filed Defendant's Opposition to Plaintiffs' Motion for Class Cert. lgl

DATE	NR.	PROCEEDINGS
1979		
Apr. 5	28	Filed letter of defendant stating typographical error in P.27, Deft's Opposition to Pltf's Motion for Class Certification, which should be: In the first full paragraph, line 14 should read "approximately 57% of the hearings requested after January". lgl
Apr. 10	29	Filed Plaintiffs' Reply Memorandum in Support of Class Certification.
Apr. 13		In open Court before Judge Holden. Richard Munzing, Esq., for pltf.; Peter Hall, AUSA, Anne M. Gulyassy, Esq., for Government.
Apr. 13		HEARING ON PLAINTIFF'S MOTION FOR CLASS CERTIFICATION.
Apr. 13		Statements made to the Court by Mr. Munzing, followed by Miss Gulyassy, further followed by Mr. Munzing, Miss Gulyassy.
Apr. 13		Decision reserved. lgl
June 15	30	Filed Opinion and Order: Plaintiff's Motion for Class Certification is granted. Copy mailed to attys. gl
July 25	31	Filed Plaintiffs Motion for Summary Judgment.
July 25	32	Filed Memorandum in Support of Plaintiff's Motion for Summary Judgment. rpd
Oct. 10	33	Filed Stipulation: Date for Deft. to serve a Motion for Summary Judgment shall be extended from 8/27/79 to 9/10/79 for the reason that draft regulations relevant to this litigation were recently drafted by the Secretary—Counsel requests this extension to incorporate the draft regulations in the Motion for Summary Judgment. lgl/gl

DATE	NR.	PROCEEDINGS
1979		
Oct. 11		Upon consideration of foregoing Stipulation, it is
Oct. 11		ORDERED: Approved. Mailed copy to attys. rer
Oct. 17	34	Filed Deft's Second Supplement to Deft's Answer to Pltf's Interrogatory #9.
Oct. 17	35	Filed Deft's Cross-Motion for Summary Judgment.
Oct. 17	36	Filed Memorandum in Support of foregoing Motion. lgl/gl
Dec. 1	37	Filed Pltfs' Reply Memo re Motion for Summary Judgment. rer
Dec. 31	38	Filed Opinion and Order—that the Plaintiff's Motion for Summary Judgment is granted on the undisputed facts presented. However, the court will defer entry of a final order to accomplish this result until the remaining claim for relief in the reconsideration procedure is heard and determined. Plaintiff's Motion for Summary Judgment, P#31 and the Defendant's Cross-Motion for Summary Judgment, P#35 are DENIED. The Clerk will schedule the case for trial on the reconsideration issue. It is so ORDERED. Copy to attorneys. cp
1980		
Jan. 7		At the call of the Calendar before Judge Holden, it was ORDERED: Passed. lgl
Jan. 15	39	Filed Pltfs' 2nd Interrogatories. rer
Feb. 20	40	Filed Deft's answer to Pltf's 2nd Interrog. gww
Feb. 17	41	Filed Plaintiff's Motion for Further Summary Judgment.

DATE	NR.	PROCEEDINGS
1980		
Feb. 17	42	Filed Memorandum in Support of P#41. cp
Mar. 26	43	Filed Deft's Motion for Enlargement of Time to Oppose Pltf's Motion for further summary judgment. Rule 9 letter sent. rpd
Apr. 3	44	Filed ORDER—that the motion, P#43, is granted; that defendant shall have until 4-14-80 to oppose plaintiff's motion for further summary judgment. Copy to attorneys. cp
Apr. 4	45	Filed Defendant's Memorandum in Support of P#43, Motion for Enlargement of Time. cp
Apr. 15	46	Filed Defendant's Motion for Enlargement of Time to Oppose Plaintiff's Motion for Summary Judgment.
Apr. 15	47	Filed Defendant's Memorandum in Support of P#46. cp
Apr. 16	48	Filed Order—Deft's Motion for Enlargement of Time etc, P#43, granted Deft. to have until 4-25-80 in which to Oppose Motion for Further Summary Judgment; Clerk to sched. hear. on pend. Motion on May 2, 1980. Mailed cpy to attys. rer
Apr. 25	49	Filed Deft's Motion for Partial Summary.
Apr. 25	50	Filed Deft's Memo in support of P#49 and in Opposition to Pltfs' Motion for Further Summary Judgment, P#41. Exhibits A thru D inc. & in separate folder. rer
Apr. 30	51	Pltf's Reply Brief.
May 2		In open Court before Judge Holden. Richard H. Munzing, Esq. for Pltf.; Anne M. Gulyassy, Esq. for Deft.

DATE	NR.	PROCEEDINGS
1980		
May 2		HEARING ON P. 41 PLTF'S MOTION FOR FURTHER SUMMARY JUDGMENT.
May 2		Statements made by Mr. Munzing, Ms. Gulyassy, Mr. Munzing.
May 2		Decision Reserved.
July 14	52	Filed MEMORANDUM OF DECISION—the motions for summary judgment must be DENIED for reasons stated. It is so ORDERED. Copy to attorneys. cp
Aug. 4	53	Filed Plaintiffs' Third Interrogatories. cp
Sep. 11	54	Filed Defendant's Answers and Objections to Plaintiffs' Third Interrogatories and Requests for Admissions, P#53
Sep. 19	55	Filed Pltfs' Motion for further Summary Judgment, Motion for Order Compelling Disc. & Motion to direct entry of Final Judgment.
Sep. 19	56	Filed Pltfs' Memo in support of P#55, Motion for further Sum. Judg.
Sep. 19	57	Filed Pltfs' Memo in support of P#55, Motions for Order Compelling Disc. & directing entry of Final Judg. (with attach.) rr
Oct. 7	58	Filed Stipulation, that the Defendant shall have until Oct. 15, 1980 to respond to P#55, Plaintiffs' Motion for Further Summary Judgment, Motion for Order Compelling Discovery and Motion to Direct Entry of Final Judgment. cp
Oct. 14		Ordered, P#58, it is so ordered this 14th day of October, 1980, that the deft. shall have until 10-15-80 to respond to P#55, Plaintiff's Motion for Further Summary Judgment, Motion for Order Compelling Discovery and Motion to Direct Entry of Final Judgment. Copy to attorneys. cp

DATE	NR.	PROCEEDINGS
1980		
Oct. 20	59	MOTION for Enlargement of Time to respond to P#55 by defts.
Oct. 20	60	MEMORANDUM in Support of Motion. gww
Oct. 22	61	Filed Deft's Opposition to Pltfs' Motion for further Summary Judgment.
Oct. 22	62	Filed Deft's Opposition to Pltfs' Motion for Order Compelling Discovery and Motion to Direct Final Judgment. rpd/lgl
Nov. 10	63	Filed Pltfs Reply Brief in Support of Pltfs Motions. gww
Nov. 19		In Court before Judge Holden. R. Munzing, Esq., for pltf.; A. Gulyassy, Esq., for deft.
Nov. 19		HEARING ON PLAINTIFF'S MOTION TO COMPEL.
Nov. 19		Statements made by Mr. Munzing, Miss Gulyassy.
Nov. 19		Mr. Munzing waived statements on Plaintiff's Motion for Further Summary Judgment.
Nov. 19		HEARING ON PLAINTIFF'S MOTION TO DIRECT ENTRY OF FINAL JUDGMENT.
Nov. 19		Statements made by Mr. Munzing, Miss Gulyassy, Mr. Munzing.
Nov. 19		Decision reserved. lgl
Dec. 5		CALENDAR CALL before Holden. ORDERED: Passed. lgl
Dec. 8	64	Filed Deft's Supplemental Opposition to Pltfs' Motion to Direct Entry of Final Judgment. rpd

DATE	NR.	PROCEEDINGS
1980		
Dec. 30	65	Filed Memorandum of Decision—Court preliminarily enjoins deft from scheduling administrative hearings more than 90 days after a timely request for such hearing is made. Designated time period will not apply when 1) claimant or his representative causes a delay by failing to provide information needed for adjudication 2) claimant or his representative requests a delay 3) claimant or his representative fails to appear for scheduled hearing 4) delay is in some other way attributable to claimant or representative. Injunction will extend from date of this order to time case comes to final resolution on the issue of the delay in the reconsideration proceedings. Mailed copy/attys. rer
1981		
Feb. 27	66	Filed Notice of Appeal by Government. Mailed copy to Clerk Fusaro (& copy of docket enteries); Judge Holden; attorneys of record & Court Reporter. gc
Mar. 5	67	Filed Pltfs' Motion for Partial Summary Judgment.
Mar. 5	68	Filed Pltfs' Memorandum in Support of P#67. cp
Mar. 19	69	Filed Defendant's Motion for Enlargement of time.
Mar. 19	70	Filed Memo in support of P.69. lgl
Mar. 23	71	Filed Scheduling Order—Record on appeal to be filed on or before 3-31-81. cb/lgl
Apr. 6	72	Filed Stipulation of Dismissal of appeal—each party to bear their own costs—with Circuit Court's approval thereon. cb

DATE	NR.	PROCEEDINGS
1981		
Apr. 10	73	Filed Defendant's Answers to Plaintiffs' Third Set of Interrogatories. dhm
Apr. 20	74	Filed Stipulation—The parties, by their undersigned attorneys, hereby agree as follows: 1. That defendant shall file his opposition to Plaintiffs' motion for partial summary judgment on or before April 30, 1981. 2. That, in light of the fact that counsel for plaintiffs will be on vacation until May 4, 1981, plaintiffs shall file their reply brief, if any, on or before May 15, 1981. It is so ORDERED. dhm
May 1	75	Filed Deft's Motion for Enlargement of Time.
May 1	76	Filed Memorandum in Support of Defendant's Motion for Enlargement of Time. dhm
May 7	77	MOTION for Partial Summary Judgment by Defts'.
May 7	78	MEMORANDUM in Support of Motion for Partial Summary Judgment and in Opposition to Pltf's Motion for Partial Summary Judgment.
May 18	79	Filed Pltfs' Reply Brief to Deft's Motion for Partial Summary Judgment. rpd
May 15		ORDER—Deft's Motion for Enlargement of Time, P# 75, is Granted with Acquiescence by Letter of Pltf. Copy to Attys. rpd
June 8	80	Filed letter from Atty. Gulyassy stating counsel are in agreement to having P.67 Pltf's Motion for further summary judgment; and P.77 Defts' Motion for partial Summary Judgment, shall be heard on papers submitted. Deft. shall be filing addition supporting papers by June 16, 1981. lgl

DATE	NR.	PROCEEDINGS
1981		
Aug. 19	81	Filed Memorandum of Decision—1) the claimant offers new medical evidence or reports new medical treatment since his initial determination; 2) the claimant agrees to undergo a consultative examination when one is suggested by the defendant; 3) the claimant or his representative causes a delay by failing to provide information needed for reconsideration; 4) the claimant or his representative requests a delay; 5) the delay is in some other way attributable to the aggrieved claimant or his representative. The court will not, however, order payment of interim benefits to claimants who suffer delays of more than 90 days in the reconsideration process. The court will direct that judgment be entered after thirty days from the filing and service of a copy of this order on counsel of record. The parties may apply for leave to be heard on the settlement of the final judgment order. Cy to attys. lgl
Oct. 5		CALENDAR CALL before Judge Holden. Stipulation for final judgment forthcoming. lgl
Oct. 15	82	STIPULATION that proposed Judgment Order will implement the finding made by the court. Defts reserve their rights to appeal. gww
Oct. 30	83	JUDGMENT ORDER—that members of the pltf class are denied their statutory right to "reasonable notice and opportunity for a hearing," pursuant to 42 U.S.C. § 405(b), when the deft fails to provide prompt administrative reconsideration decisions and prompt administrative law judge hearings for those Title II disability insurance benefit claimants residing in the District of VT who request reconsideration and/or hearing be-

DATE	NR.	PROCEEDINGS
1981		
Oct. 30		fore an administrative law judge following adverse initial determinations by the deft that they are not disabled. IT IS FURTHER ORDERED AND ADJUDGED THAT:— all present and future VT residents seeking to secure SS Disability benefits who, following an initial determination by the deft that no disability exists, experienced an unreasonable delay in the scheduling of and/or issuance of decisions in reconsiderations and fair hearings. etc. 10. Within 60 days from the date of this order, the deft shall submit to the Court and to the pltf attys a detailed statement or plan for implementing the relief required herein on a continued basis and the actual administrative steps taken to effectuate aid plan. etc. 11. This Court shall retain continuing jurisdiction over this cause to insure compliance with the provisions of this Order for a period of no less than one year from the date hereof. Cy to attys.
Dec. 6	84	ORDER—The judgment order dated October 30, 1981 (P.83) is hereby vacated and the correct judgment order stipulated by the parties will be entered in lieu thereof. It is so ORDERED. Cy to attys.
Dec. 6	85	JUDGMENT ORDER. Cy to attys. lgl
Dec. 12	86	STIPULATION that defts may submit for filing revised case summaries and Declaration of Theodore S. Allen, previously designated Exhibit A to Deft's Motion for Partial Summary Judgment and NOTICE of Filing. P#77 and 78. rer
Dec. 12	87	DECLARATION of Theodore S. Allen with revised case summaries and Social Security Administration Evaluations attached. rer

DATE	NR.	PROCEEDINGS
1982		
Jan. 4	88	PLAN for implementing Court's Judgment (P#85) with Exhibit attached by Deft. rer
Jan. 5	89	NOTICE OF APPEAL by Govt. from Judgment Order entered 11/6/81.
Jan. 8		Mailed copy of Notice to Clerk Fusaro, Judge Holden, Court Reporter, and Attorneys of Record. cb

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 82-6009

LEON S. DAY

v.

RICHARD S. SCHWEIKER

RELEVANT DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
01-12-82	Filed copy of district court docket entries & notice of appeal on behalf of Appellant Richard S. Schweiker
01-18-82	Order dismissing the appeal [without judicial action] by clerk's order filed
01-18-82	Issued certified copy of order dismissing the appeal, etc.
01-20-82	Appellant Schweiker motion for reinstatement of the appeal filed; Appellant Schweiker motion to filed Forms C & D out of time filed [w/pfs]
01-20-82	Appellant Schweiker Form C received [w/pfs]
01-20-82	Appellant Schweiker Form D received [w/pfs]
01-29-82	Order granted, Appellant Schweiker motion for reinstatement of the appeal filed; Order granted, Appellant Schweiker motion to file Forms C & D out of time filed [RJC, CJ] [endorsed on motion of 01-20-82]
01-29-82	Issued certified copy of order granting Appellant's motion for reinstatement, etc.
01-29-82	Appellant Schweiker Form C filed [w/pfs]
01-29-82	Appellant Schweiker Form D filed [w/pfs]

DATE	FILINGS—PROCEEDINGS
02-08-82	Receipt of certified copy of order dismissing appeal, etc. received
02-09-82	Scheduling Order #1 filed [PG: 02-19-82 at 10:00 AM]
02-17-82	Receipt of certified copy of order granting Appellant's motion for reinstatement, etc. received
02-22-82	Record on appeal filed [original papers of district court]
03-09-82	Appellant Schweiker motion for an extension of time to file brief and appendix filed [w/pfs]
03-12-82	Scheduling Order #2 filed [endorsed on motion of 03-09-82]
04-05-82	Appellant Schweiker brief filed [w/pfs] [by mail]
04-05-82	Appellant Schweiker appendix filed [w/pfs] [by mail]
04-28-82	Appellee Day, et al. brief filed [w/pfs] [by mail]
05-20-82	Appellant Schweiker reply brief, filed (w/pfs)

Leon S. Day v. Richard S. Schweiker

CASE TITLE

DOCKET NO. ▶ 82-6009

MR NUMBER ▶

TYPE OF CASE: [X] U.S. Civil [ ] Bankruptcy [ ] Criminal — [ ] Original proc. [ ] Private Civil [ ] Prisoner — [ ] Administrative — 2-242

DISTRICT COURT: [ ] Conn. [ ] EDNY [ ] NDNY [ ] NDNY [ ] SDNY [X] VT [ ] Other (specify) 2/9-1

▶ Forms	Date Filed
A	
B	
C	:01-29-82
D	:01-29-82
CJA 20	
CJA 23	
Other (specify)	

SAFE(S) PREARGUMENT CONFERENCE(S) HELD:

DOCKET FEE

DATE

ACCOUNT OF APPELLANT

RECEIVED: NO FEE REQUIRED

DISBURSED

NO FEE REQUIRED: [ ] FP [ ] 24a [ ] SC

DISTRICT COURT DATA:

DISTRICT DOCKET NO.: 78-266

DATE ACTION FILED IN DIST. COURT: 11-15-78

DATE OF DISTRICT COURT JUDGMENT: 11-06-81

DATE N.A. FILED: 01-05-82

DATE DOCKETED: 01-12-82

[ ] CROSS APPEAL OR [ ] CONSOLIDATED WITH DOCKET NOS:

▶ prior 81-6037

RECORD FILED (ORIGINAL DIST. COURT PAPERS): 02-22-82

(TRANSCRIPT(S)):

▶ SCHEDULING ORDERS

	SO 1	Adj SO 2	Adj SO 3	Adj SO 4	Adj SO 5
	DATE ISSUED	DATE ISSUED	DATE ISSUED	DATE ISSUED	DATE ISSUED
	2-9-82	3-12-82			
Record	2-25-82				
Transcript					
BRIEFS: Appellant	3-12-82	4-02-82			
No.					
Appellee	4-5-82	4-26-82			
No.					
Argument (Week of)	4-12-82	5-10-82			

[ ] ADJ. SO, 6 ETC. OVER [ ] APPELLEE'S APPENDIX

FILING OF BRIEF, APPENDIX, ETC.

PAPER FILED	PARTY	DATE
B [10]	T	04-05-82
A [18]	T	04-05-82
B [11]	E	04-28-82
Rp. B	T	5/20/82
PETITION	T	8-11-82

▶ MOTIONS TO EXTEND TIME

	Date Filed	Order Entered
1		
2		
3		
4		
5		
6		
7		
8		
9		
10		

Proceedings Held in Abeyance [ ] Reactivated [ ]

Issuance of Mandate Stayed [ ] Stay Vacated [ ]

▶ CALENDAR

Date Time Request Sent: 02-09-82

Date Disqualification Sent:

Date Certain Notices Sent (No. sent ____) 1 2 3 4 5 6 ____

Receipt of Day Certain Notices 1 2 3 4 5 6 [ ]

Date Set for Argument: 6/9/82, 10:30

Committed [ ]

Not Committed [ ]

ROR [ ]

Bail [ ]

▶ TERMINATION

Date Heard/Submitted: 6/9/82

Tape No.: 265-266

Date Judgment Filed: 6-28-82

Date Mandate Issued: 9-24-82

Date Bill of Costs Filed: 07-12-82

Date Statement of Costs Filed: 8-31-82

Petition for Rehearing Filed Date 8-11-82 — Granted [ ] Denied [X] Date 9-17-82

[ ] Additional Petitions for Rehearing-See Docket Entries

Petition for Certiorari Filed Date — Granted [ ] Denied [ ] Date

[ ] Additional Petitions for Certiorari-See Docket Entries

▶ METHOD OF DISPOSITION

[ ] WRITTEN OPINION (BY JUDGE)
[X] WRITTEN OPINION (PER CURIAM)
[ ] DECISION FROM THE BENCH
[ ] SUMMARY ORDER
[ ] COURT ORDER W/O OPINION
[ ] DEFAULT DISMISSAL (CAMP, CAEP, OTHER)
[ ] CONSENT DISMISSAL (RULE 33, CRIMINAL, OTHER)
[ ] D.I.S.(?) DISMISSAL
[ ] OTHER (SPECIFY)

Record Returned: 10-2-82

Receipt of Return of Records

Date Reopened: 1-20-83

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Civil Action No.

LEON S. DAY, on behalf of himself and all others similarly situated, PLAINTIFF

vs.

JOSEPH A. CALIFANO, JR., Secretary, United States Department of Health, Education and Welfare, DEFENDANT

AFFIDAVIT TO ACCOMPANY APPLICATION TO PROCEED IN FORMA PAUPERIS

I, Leon S. Day, being first duly sworn, depose and say that I am the plaintiff in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefore, I state that because of my poverty, I am unable to pay the costs at said proceeding; that I believe that I am entitled to redress; and that the issues I desire to litigate are set out in the attached Complaint.

I further swear that the statements I have made below relating to my ability to pay the filing fee, cost of service of process, and any other fees at said proceeding are true to the best of my knowledge, information and belief.

1. I am presently unemployed and have been since December 1975, when I earned about $900 dollars per month.

2. Within the last twelve months I have received no income from a business, profession, or other form of self-employment or in the form of rent payment, dividends, interest, or other similar sources.

3. Within the last twelve months I have received no income from grants, pensions, Social Security benefits, welfare, or other similar sources, except my General

Electric pension of $228.26 per month and my Veteran's Pension of $41.00 per month.

4. With the past twelve months my sole source of income has been the above-stated pensions. In addition, my wife has been working since August, 1978, earning $114.00 per week.

5. I own a total amount of $27.00 in cash, checking accounts, and savings accounts.

6. I own no real estate, stocks, bonds, notes, automobiles and other valuable property (excluding ordinary household furnishings and clothing), except for a 1964 Chevrolet with an approximate value of $50.00.

7. My wife, my 19 year old college daughter, my 16 year old daughter, and my 14 year old son are dependent upon me for their support.

8. My family presently has an outstanding fuel bill of $1181.93, and outstanding medical bills of $133.00.

9. All of the monthly income of my wife and myself goes to meet the basic monthly living expenses of our family.

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

/s/ Leon S. Day
LEON S. DAY

STATE OF VERMONT
WINDSOR COUNTY, SS

Subscribed and sworn to before me this 13th day of November, 1978.

/s/ Illegible
Notary Public

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Civil Action 78-266

LEON S. DAY, on behalf of himself and all others similarly situated, PLAINTIFF

vs.

JOSEPH A. CALIFANO, JR., Secretary, United States Department of Health, Education and Welfare, DEFENDANT

AMENDED COMPLAINT—CLASS ACTION

I. PRELIMINARY STATEMENT

1. This is a civil class action seeking declaratory and injunctive relief to compel agency action wrongfully withheld or delayed in regard to the scheduling of and/or issuance of decision in administrative reconsiderations and fair hearings following initial adverse determinations issued to individuals seeking to secure Social Security disability benefits under 42 U.S.C. §§ 401 et seq. Plaintiff seeks declaratory relief that the actions or failures to act of defendant violate the due process clause of the Fifth Amendment to the United States Constitution, Title II of the Social Security Act at 42 U.S.C. § 405(b), and the Administrative Procedure Act at 5 U.S.C. §§ 555 (b) and (e) and 706 (1). Plaintiff further seeks injunctive relief restraining defendant from continuing his present practice of failing to make reconsideration decisions, schedule fair hearings, and issue fair hearing decisions promptly and within a reasonable time after respective request is made therefor.

II. JURISDICTION

2. Jurisdiction is conferred upon the Court by 28 U.S.C. § 1361, as this is an action in the nature of mandamus to compel an officer or employee of the De-

partment of Health, Education and Welfare to perform a duty owed to plaintiff and the class he represents.

3. The Court also has jurisdiction under 28 U.S.C. § 1331(a), as this action arises under the Constitution and laws of the United States and is brought against an officer or employee of a United States agency in his official capacity.

4. Plaintiff's request for declaratory relief is brought pursuant to 28 U.S.C. §§ 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure.

III. VENUE

5. Pursuant to 28 U.S.C. § 1391(e), venue in this case is proper in the District of Vermont, where the cause of action arose.

IV. PARTIES

6. Plaintiff Leon S. Day is a 53 year old citizen of the United States and a resident of the State of Vermont. He, his wife, and his three (3) minor children are seeking restoration of the Social Security disability benefits that were terminated by the defendant effective December, 1977.

7. Defendant Joseph A. Califano, Jr., is the Secretary of the United States Department of Health, Education and Welfare. Pursuant to 42 U.S.C. § 401, et seq., he is responsible for the administration of the program to provide benefits to disabled individuals under Title II of the Social Security Act.

V. STATEMENT OF FACTS

8. Plaintiff Leon S. Day was determined by the defendant's predecessor to be disabled in December, 1975. Plaintiff, his wife and children collected disability benefits under Title II of the Social Security Act until December 1977, when the defendant determined that plain-

tiff had ceased to be disabled. At that time, plaintiff's families' monthly Title II entitlement of approximately $675.00 was terminated.

9. Plaintiff formally filed a request for reconsideration on December 21, 1977, alleging that he continued to be disabled. A copy of his request is attached hereto and incorporated herein as Exhibit 1.

10. The defendant failed to make a reconsideration determination until June 6, 1978. A copy of the Notice of Reconsideration is attached hereto and incorporated herein as Exhibit 2.

11. Through his attorney, plaintiff requested a fair hearing of the reconsideration decision on June 14, 1978. A copy of the defendant's acknowledgement of this request is attached hereto and incorporated herein as Exhibit 3.

12. To date, plaintiff has not received a fair hearing despite repeated attempts to have one scheduled. On November 8, 1978, plaintiff's attorney telephoned the defendant's Bureau of Hearings and Appeals in Manchester, New Hampshire, and was told that no fair hearing date had been set for plaintiff and that all available November hearing dates had been otherwise assigned.

13. Plaintiff alleges that he has been continuously disabled since December, 1975, and that his family has thereby been continuously eligible for disability benefits. Yet since the loss of these benefits in December, 1977, plaintiff's family has been forced to move to a lower rental apartment, they have incurred large debts; plaintiff's wife has been forced to obtain a full-time job.

14. As a result of defendant's actions or failure to act, plaintiff and the members of his class have suffered and will continue to suffer irreparable injury from which there is no adequate remedy at law.

VI. CLASS ACTION ALLEGATIONS

15. Plaintiff brings this action on behalf of himself and all others similarly situated pursuant to Rule 23

(and especially Rule 23(b)(2)) of the Federal Rules of Civil Procedure. The class consists of all present and future Vermont residents seeking to secure Social Security disability benefits following an initial determination by the defendant that no disability exists, and who experience an unreasonable delay in the scheduling of and/or issuance of decisions in reconsiderations and fair hearings.

16. Plaintiff is unaware of the precise number of persons in the class, as the number fluctuates, but this information is within the knowledge of defendant. Plaintiff alleges that the class is so numerous that joinder of all members is impracticable, and he has initiated discovery to substantiate these beliefs.

17. The questions of law and fact applicable in the plaintiff's case are common to the class as a whole. The lack of prompt scheduling of administrative appellate processes affects all class members, as will a judicial determination that defendant's delays in the scheduling of and/or issuance of decision in reconsiderations and fair hearings for individuals seeking disability benefits violate the due process clause of the Fifth Amendment, the Social Security Act, or the Administration Procedure Act.

18. Plaintiff's claim is typical of the claims of his class in that all class members are similarly adversely affected by the defendant's unreasonable delays through the failure to be paid disability benefits.

19. Plaintiff will fairly and adequately protect the interest of the class in that more prompt administrative processes will expedite the payment of disability benefits to all class members. Plaintiff is aware of no conflicts of interest among class members, and alleges that his attorneys, who are experienced in Social Security litigation, are qualified to protect the interests of all members of the class.

20. The defendant has acted or refused to act on grounds generally applicable to the class, in that the ad-

ministrative appellate process is tortuous to all Title II disability claimants. Thus, appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole is appropriate.

VII. CAUSES OF ACTION

FIRST CAUSE OF ACTION

21. Under 42 U.S.C. § 423, the defendant must provide Title II disability benefits to eligible individuals.

22. When disability benefits are denied or terminated on the defendant's initial determination that an individual is not disabled, 20 C.F.R. §§ 404.909 et seq. allows the individual to obtain judicial review only after exhausting an administrative appellate route consisting of three stages: reconsideration, fair hearing, and Appeals Council review.

23. Under his own regulations, the defendant is not required to make a reconsideration decision within any time limitation following an individual's initial appeal of a determination that he is not disabled. Pursuant to 20 C.F.R. § 404.917, however, the individual cannot request a fair hearing until the defendant's reconsideration determination is made.

24. Under 42 U.S.C. § 405(b), the defendant is required to provide dissatisfied Title II disability claimants with "reasonable notice and opportunity for a hearing."

25. The defendant's delays in scheduling or processing of reconsideration determinations, fair hearings, and/or fair hearing decisions fails to provide plaintiff and his class with reasonable opportunity for a hearing, in violation of the Social Security Act at 42 U.S.C. § 405(b).

SECOND CAUSE OF ACTION

26. Plaintiff realleges paragraphs 21-23 as paragraph 26 of his Second Cause of Action.

27. Under 5 U.S.C. § 555(b) and (e), the defendant is required to conclude administrative appeals "within

a reasonable time," and to give "prompt notice" of decisions denying benefits. Under 5 U.S.C. § 706(1), a reviewing court shall "compel agency action unlawfully withheld or unreasonably delayed."

28. The defendant's delays in scheduling or processing of reconsideration determinations, fair hearings, and/or fair hearing decisions cause administrative appeals not to be concluded within a reasonable time and fail to permit the rendering of prompt notice of decision to plaintiff and his class, in violation of the Administrative Procedure Act at 5 U.S.C. § 555(b) and (e).

THIRD CAUSE OF ACTION

29. Plaintiff realleges paragraphs 21-23 as paragraph 29 of his Third Cause of Action.

30. Under the Fifth Amendment to the U.S. Constitution, plaintiff and the members of his class are entitled not to be deprived of "property, without due process of law."

31. The defendant's delays in scheduling or processing of reconsideration determinations, fair hearings, and/or fair hearing decisions result in the deprivation to plaintiff and the members of his class of disability benefits to which they are lawfully entitled, in violation of the due process clause of the Fifth Amendment.

VIII. PRAYER FOR RELIEF

WHEREFORE, plaintiff prays that the Court:

1. Enter an Order certifying this as a class action and naming plaintiff as a class representative;

2. Grant a temporary restraining order restraining defendant, his agents and employees, from continuing to fail to schedule a fair hearing, and order that said hearing be scheduled immediately, and that a hearing decision be rendered promptly thereafter;

3. Grant a preliminary and permanent injunction enjoining defendant, his agents and employees, from delay-

ing in the making of reconsideration determinations, scheduling of fair hearings, and/or issuing of fair hearing decisions for plaintiff and the class he represents, and ordering that all such administrative appellate actions be accomplished within such reasonable time as the Court may determine to be consistent with the due process clause of the Fifth Amendment, the Social Security Act, and the Administrative Proceduce Act;

4. Declare that the defendant's actions in delaying the making of reconsideration decisions, the scheduling a fair hearings, and/or the issuing of fair hearing decisions within a reasonable time for plaintiff and the class he represents violate the due process clause of the Fifth Amendment, the Social Security Act, and the Administrative Procedure Act; and

5. Award plaintiff his costs and dispursements herein, his reasonable attorney's fees, and such other relief as the Court may deem to be equitable, just and proper.

I have read the above and know this to be true.

/s/ Leon S. Day
LEON S. DAY

/s/ Richard H. Munzing, Esq.
RICHARD H. MUNZING, Esq.
Vermont Legal Aid, Inc.
3 Summer Street
Springfield, Vermont 05156

STATE OF VERMONT
WINDSOR COUNTY, SS

At Springfield, in said County of Windsor, this 21st day of November, 1978, personally appeared the above-named Leon S. Day and made oath to the truth of the allegations of the foregoing Complaint.

Before me,

/s/ Donna M. Benton
Notary Public

EXHIBIT 2

SOCIAL SECURITY
NOTICE OF RECONSIDERATION

From: Department of Health, Education, and Welfare
Social Security Administration

Date: Jun 06 1978
Your Claim Number:
008-16-8830

Mr. Leon S. Day
32 Main Street
Ludlow, Vermont 05149

Dear Mr. Day:

In view of your request for reconsideration, all the information about your claim has been carefully evaluated. It has been determined that the previous decision was proper under the law.

A period of disability was established for you beginning December 1975 because of the effects of a stroke. The law provides that an individual's disability period shall end if a person is able to do substantial gainful work. The law also provides that an individual will receive benefit payments for the month disability ends and the following two months. The medical evidence in your case shows that you became able to do substantial gainful work in September 1977.

On reconsideration, all the evidence was reviewed, including the additional evidence submitted and no other condition was disclosed that would prevent you from working.

Your records show you are 52 years of age, have completed 10 years of school and have experience as a toolmaker for airplane motors. The evidence establishes that by September 1977 you became able to do substantial gainful work. Therefore, the determination ending your period of disability and disability benefits to you and

your family with the month of November 1977 has been affirmed.

If you believe that the reconsideration determination is not correct, you may request a hearing before an administrative law judge of the Bureau of Hearings and Appeals. If you want a hearing, you must request it not later than 60 days from the date you receive this notice. You may make your request through any social security office. Read the enclosed leaflet FHA-1 for a full explanation of your right to appeal:

ISSUED BY: Bureau of Disability Insurance
Division of Reconsideration

SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

EXHIBIT 3

REQUEST FOR HEARING

Take or M[illegible]riginal and all copies to your local Socia[illegible]curity Office.

CLAIMANT'S NAME: Leon Day

WAGE EARNER'S NAME (If name shown if same as above)

SOCIAL SECURITY NUMBER: 008-16-8830

SPOUSE'S NAME AND SOCIAL SECURITY NUMBER (Complete ONLY if Supplemental Security Income Case)

CLAIM FOR (Check one or more boxes) (Circle type of claim)

- [X] Establishment to Disability Benefits — DIB DWB CDB
- [ ] Continuance of Disability Benefits — DIB DWB CDB
- [ ] Supplemental Security Income — Aged Blind Disabled
- [ ] Continuance of Supplemental Security Income — Aged Blind Disabled
- [ ] Other (Specify) _____

I disagree with the determination made on the above claim and request a hearing. My reasons for disagreement are:

see attached letter dated 6/11/78.

Check one of the following:

- [ ] I have additional evidence to submit (Attach such evidence to this form or forward to the Social Security Office within 10 days.)
- [ ] I have no additional evidence to submit.

Check ONLY ONE of the statements below:

- [ ] I wish to appear in person.
- [ ] I waive my right to appear and give evidence, and hereby request a decision on the evidence on file.

Signed by: (Either the claimant or representative should sign. Enter addresses for both. If claimant's representative is not an attorney, complete Form SSA-1696.)

SIGNATURE OR NAME OF CLAIMANT'S REPRESENTATIVE	CLAIMANT'S SIGNATURE
Richard Kargler ☐ ATTORNEY ☐ NON-ATTORNEY	Leon Day
ADDRESS: 3 Summer St.	ADDRESS: 32 Main St.
CITY, STATE, AND ZIP CODE: Springfield, Vt. 05156	CITY, STATE, AND ZIP CODE: Ludlow, Vt. 05149
TELEPHONE NUMBER: ( )	DATE: 6/11/78 (Do not sign above this line)
	TELEPHONE NUMBER

TO BE COMPLETED BY SOCIAL SECURITY ADMINISTRATION

Is this request timely filed? [X] YES [ ] NO

If "No" is checked: (1) Attach claimant's explanation for delay, (2) Attach any pertinent letter, material, or information in the Social Security Office.

ACKNOWLEDGMENT OF REQUEST FOR HEARING

Your request for a hearing was filed on 6/11/78 at Rutland, Vt. 05701

The Administrative Law Judge or the Hearing Examiner, SSI, will notify you of the time and place of the hearing at least 10 days prior to the date which will be set for the hearing.

[illegible]

For the Social Security Administration

By: _____ (Signature) (Title)

362 S. Main St.
(Street Address)

Rutland, Vt. 05701
(City) (State) (Zip Code)

525

Form HA-501
(2/78)

REPRESENTATIVE

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

Civil Action No. ————

LEON S. DAY, on behalf of himself and
all others similarly situated, PLAINTIFFS

v.

JOSEPH A. CALIFANO, Secretary of the Department of
Health, Education, and Welfare, DEFENDANT

MOTION OF AMEDIE MAURAIS TO INTERVENE AS PARTY PLAINTIFF

Now comes Amedie Maurais and moves this Honorable Court, pursuant to Rule 24 F.R.C.P., for leave to intervene as a party plaintiff in the above-entitled action. In support of this motion, plaintiff states as follows:

1. Plaintiff incorporates in this motion the allegations contained in his verified complaint, filed in this court simultaneously with this motion;

2. Plaintiff should be permitted to intervene pursuant to Rule 24(b), inasmuch as plaintiff's legal claims and the legal claims presented in this cause of action are identical, i.e. whether defendant's practice of failing to make reconsideration decisions, schedule fair hearings, and issue fair hearing decisions promptly and within a reasonable time after respective requests therefor violates the Fifth Amendment to the U.S. Constitution, the Administrative Procedure Act, or the Social Security Act;

3. Intervention will serve the essential ends of justice and judicial economy.

Dated at St. Johnsbury, Vermont, this 30th day of November, 1978.

AMEDIE MAURAIS
By: /s/ Ronald K. Lospennato
RONALD K. LOSPENNATO, ESQ.
His Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

Civil Action No. ————

LEON S. DAY, on behalf of himself and all others similarly situated, PLAINTIFF,
AMEDIE MAURAIS, INTERVENOR PLAINTIFF

v.

JOSEPH A. CALIFANO, Secretary of the Department of Health, Education, and Welfare, DEFENDANT

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

Rule 24(b) permits intervention when the applicant's claim and the main action have a question of law or fact in common. In this case, the applicant's legal claims are identical to the claim of the plaintiff. Intervenor Maurais is also challenging the defendant's practice of failing to make reconsideration decisions, schedule fair hearings, and issue fair hearing decisions promptly and within a reasonable time after respective request is made therefor as violative of the Fifth Amendment to the U.S. Constitution, the Administrative Procedure Act, and the Social Security Act.

Since the legal claims are identical, intervention should be allowed. *Epstein* v. *Weiss*, 50 FRD 387 (D. La. 1970); *Berley* v. *Dreyfus & Co.*, 43 FRD 397 (D. N.Y. 1967). Generally, intervention will be allowed where common questions of law are present, unless it is determined that intervention will unduly delay or prejudice the rights of the original parties. *Moore* v. *Jungipahoa Parish School Bd.*, 298 F. Supp. 288 (D. La. 1969); *Shipley* v. *Pittsburgh & L.E.R. Co.*, 70 F. Supp. 870 (D. Pa. 1947); *Degge* v. *City of Boulder, Colo.*, 336 F2d 220 (C.A. Colo. 1966); *Archer* v. *U.S.*, 268 F2d 687 (C.A. Utah, 1959); *Carrol* v. *American Federation of Musicians*, 33 FRD

353 (D.C. N.Y. 1963). Since intervention here would not unduly delay or prejudice the rights of the original parties, the application should be granted. This is especially true since the underlying purpose of this rule was to prevent a multiplicity of lawsuits where common questions of law or fact are involved, *Reich* v. *Webb*, 336 F2d 153 (C.A. Cal. 1964) cert den 380 US 915, and if intervention were not allowed here the result would simply be the institution of another lawsuit with identical legal claims as the present one.

Dated at St. Johnsbury, Vermont, this 30th day of November, 1978.

/s/ Ronald K. Lospennato
RONALD K. LOSPENNATO, ESQ.
Vermont Legal Aid, Inc.
55 Main Street
St. Johnsbury, Vermont
Attorneys for Intervening Plaintiff

CERTIFICATE OF SERVICE

I, Ronald K. Lospennato, hereby certify that I served a copy of the foregoing Memorandum on the following, by mailing a copy thereof, first class mail, proper postage affixed, to the following address:

William Gray, Esq.
U.S. Attorney
Rutland, Vermont 05701

/s/ Ronald K. Lospennato
RONALD K. LOSPENNATO, ESQ.
Vermont Legal Aid, Inc.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Civil Action No. ————

LEON S. DAY, on behalf of himself and all others similarly situated, PLAINTIFF

vs.

JOSEPH A. CALIFANO, JR., Secretary, United States Department of Health, Education, and Welfare, DEFENDANT

VERIFIED COMPLAINT OF INTERVENOR PLAINTIFF AMEDIE MAURAIS

I. PRELIMINARY STATEMENT

1. Intervenor Maurais incorporates by reference paragraph one of the above-entitled complaint.

II. JURISDICTION

2. Intervenor Maurais incorporates by reference paragraphs two, three, and four of the above-entitled complaint.

III. VENUE

3. Intervenor Maurais incorporates by reference paragraph five of the above-entitled complaint.

IV. PARTIES

4. Intervenor Maurais is a 51 year old citizen of the United States and a resident of the State of Vermont. He, his wife, and only child are seeking the restoration of the Social Security Disability benefits that were terminated by the defendant effective November, 1977. His Social Security Number is 003-18-4824.

5. Intervenor Maurais incorporates by reference paragraphs six and seven of the above-entitled complaint.

V. STATEMENT OF FACTS

6. Intervenor Maurais was determined by the defendant's predecessor to be disabled in June, 1976. Plaintiff, his wife, and child collected disability benefits under Title II of the Social Security Act until April 1977 when the defendant notified Intervenor in two separate letters that he had ceased to be disabled effective November, 1977 and that he had been overpayed a total of $2,242.40. Intervenor did not receive before April 1978 notice that his families Title II benefits were being terminated. The last Social Security Disability check he received was in March, 1978.

7. Intervenor Maurais through his attorney filed a request for reconsideration on June 2, 1978, alleging that he continued to be disabled and that, in any event, his overpayment should be waived. A copy of his request is attached hereto and incorporated herein as Exhibit 4.

8. As of this date defendant has failed to make a reconsideration determination.

9. Through his attorney, Intervenor has repeatedly requested a decision on his request for reconsideration, but to no avail. On or about November 14, 1978 Intervenor's attorney was told by Blaine Kinsey of the Montpelier office of the Social Security Administration that Intervenor's file had been forwarded to Baltimore and there was no indication when a decision would be forthcoming.

10. Intervenor alleges that he has been continually disabled since June, 1976, and that his family has thereby been continuously eligible for disability benefits. Yet, since the end of these benefits in April, 1977, plaintiff's family has had to go into substantial debt to maintain payment and expenses for their home, have had difficulty in purchasing prescription drugs, and have been unable to repair their 1969 Pickup Truck.

11. Intervenor Maurais incorporates by reference paragraphs eight through fourteen inclusive of the above-entitled complaint.

VI. CLASS ACTION ALLEGATIONS

12. Intervenor Maurais incorporates by reference paragraphs fifteen through twenty inclusive of the above-entitled complaint.

VII. CAUSES OF ACTION

13. Intervenor Maurais incorporates by reference paragraphs twenty-one through thirty-one inclusive of the above-entitled complaint.

VIII. PRAYER FOR RELIEF

14. Intervenor Maurais incorporates by reference paragraphs one through five inclusive of the Prayer for Relief in the above-entitled complaint.

I have read the above and know those allegations pertaining to me personally to be true.

/s/ Amedie Maurais
AMEDIE MAURAIS

/s/ Ronald K. Lospennato
RONALD K. LOSPENNATO, ESQ.
Vermont Legal Aid, Inc.
55 Main Street
St. Johnsbury, Vermont

STATE OF VERMONT
CALEDONIA COUNTY, SS

At St. Johnsbury, in said County of Caledonia, this 30th day of November, 1978, personally appeared the above-named Amedie Maurais and made oath to the truth of the allegations of the foregoing complaint.

Before me,

/s/ [Illegible]
Notary Public

June 2, 1978

55 Main Street
St. Johnsbury, Vt.

Social Security Administration
Box 338
Montpelier, VT 05602

RE: Amedie Maurais; SSN 003-18-4824

Dear People:

I am representing the above-named Amedie Maurais and am writing to request reconsideration in regard to the Notice of Overpayment he just received.

This case is complicated by the fact that Mr. Maurais was receiving Social Security disability benefits and the overpayment he just received dated April 14, 1978 states that he was overpaid benefits since November, 1977. Mr. Maurais states that he never received a notice from the Social Security Administration informing him that his benefits were terminated and the first notice he got from Social Security was the overpayment notice.

He had received a letter dated September 13, 1977 from the Disability Determination Agency to which he replied by letter dated September 24, 1977. He states that the next notice he got was the overpayment notice.

Thus Mr. Maurais disputes the fact that he is no longer disabled and would request reconsideration on that issue. If he did not receive any prior notice from Social Security informing him that his benefits were being terminated it would appear clear that he should be entitled at this point to request reconsideration on the issue of disability. If there [sic] were to be done the overpayment issue should be held in abeyance until a final determination is made on the question of the disability appeal. Thus this request for reconsideration should be treated as a request for reconsideration as to the issue of whether Mr. Maurais is still disabled.

If in fact it is finally determined that he is no longer disabled he would also request reconsideration or waiver on the overpayment issue as noted above. The overpayment was not his fault in any way and he accepted the payments because he thought they were correctly paid to him in that he had not received any prior notice of termination from Social Security. He also could not meet his current living expenses if he had to pay back the overpayment.

As per my telephone conversation with your office I would appreciate it if you would notify me as soon as you get more information as to whether there is in your file a preceding termination notice. I would request that the overpayment issue be held in abeyance until it is determined whether he received a prior notice of overpayment and the actual disability decision be treated first.

In that regard I would appreciate it if you could send to me copies of any of the medical information that is in his file as soon as you receive it. I enclose a medical information release that would authorize you to send this information to me. Thank you.

Sincerely,

Zander B. Rubin
Staff Attorney

ZBR/kdc

Enclosure

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Civil Action No. 78-266

LEON S. DAY, PLAINTIFF

v.

JOSEPH A. CALIFANO, JR., Secretary, United States Department of Health, Education and Welfare, DEFENDANT

DEFENDANT'S ANSWERS TO PLAINTIFF'S INTERROGATORIES

Now comes the defendant, Secretary of the Department of Health, Education and Welfare, by his attorneys, and pursuant to Rule 33 of the Federal Rules of Civil Procedures hereby answers Plaintiff's Interrogatories.

The term "straight Title II" as used in these answers excludes all concurrent Title II - Title XVI claims. All answers, unless stated otherwise, are restricted to information concerning Vermont claimants. The following abbreviations will be used:

BDI—The Bureau of Disability Insurance

BHA—Bureau of Hearings and Appeals

DDA—The Vermont Disability Determination Agency (the state agency which, by contract, makes disability determinations on behalf of the Secretary of Health, Education and Welfare for Vermont claimants)

INTERROGATORY NO. 1:

Please state the full name(s) and address(es) of the person(s) answering. If more than one person answers, the name of each should be specified as part of the response to each question or part of a question. If an an-

swer is the combined response of more than one person, indicate the name of each who contributes information to that answer.

ANSWER:

The interrogatories pertaining to initial and reconsideration determinations are answered by:

Robert C. Green
Regional Commissioner, Boston Region
Social Security Administration
John Fitzgerald Kennedy Federal Building
Boston, Massachusetts 02203

To assist Mr. Green in his formulation of answers to these Interrogatories, the following individuals compiled information for his use:

Thomas D. Murphy
Social Insurance Operations Specialist
Disability Insurance, Boston Region
Social Security Administration
John Fitzgerald Kennedy Federal Building
Boston, Massachusetts 02203

Laurie Schoendorfer
Operations Branch Chief
Division of Operations Support
Office of the Regional Commissioner, Boston Region
Social Security Administration
John Fitzgerald Kennedy Federal Building
Boston, Massachusetts 02203

The interrogatories pertaining to the hearing level of appeal are answered by:

Harold H. Fischer
Regional Chief Administrative Law Judge,
Boston Region
Bureau of Hearings and Appeals
Social Security Administration

John Fitzgerald Kennedy Federal Building
Boston, Massachusetts 02203

To assist Judge Fischer in his formulation of answers to these Interrogatories, the following individuals compiled information for his use:

Thomas J. Morrissey
Management Analyst
Bureau of Hearings and Appeals, Boston Region
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Boston, Massachusetts 02203

Darlene Wichterman
Program Management Officer
Bureau of Hearings and Appeals, Boston Region
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John Fitzgerald Kennedy Federal Building
Boston, Massachusetts 02203

Rita McLaughlin
Administrative Officer, Manchester Hearing Office
Bureau of Hearings and Appeals, Boston Region
Social Security Administration
275 Chestnut Street
Manchester, New Hampshire

INTERROGATORY NO. 2:

Please state your office, title, and relationship to the defendant. If you are an agent of the defendant, please so state and indicate any limitation upon the scope of your agency.

ANSWER:

Please see certifications attached to these answers.

Interrogatories 3-10 are answered by Mr. Green. The answers to Interrogatories 3-8 are based on figures from October 1, 1976 to November 30, 1978 since existing records for the period from July 1,

1976 to October 1, 1976 do not separately identify straight Title II claims. The answers are not readily available in the form requested; the figures, therefore, represent information accurate to the best of defendant's knowledge.

INTERROGATORY NO. 3:

From July 1, 1976 to the present, please state the total number of persons in Vermont who have filed claims for straight Title II diasibility benefits in Vermont.

ANSWER:

From October 1, 1976 to November 30, 1978, 3,588 persons in Vermont have filed claims for straight Title II disability benefits that required a medical/vocational determination.

INTERROGATORY NO. 4:

From July 1, 1976 to the present, please state the total number of persons in Vermont who have had initial determinations resulting in an award of straight Title II disability benefits, and state the total number of persons in Vermont who have had initial determinations denying straight Title II disability claims.

ANSWER:

From October 1, 1976 to November 30, 1978, 1,914 initial DDA determinations resulted in an allowance of straight Title II disability benefits, and 1,674 initial DDA determinations denied straight Title II disability claims in Vermont.

INTERROGATORY NO. 5:

From July 1, 1976 to the present, please state the total number of persons in Vermont who have had straight

Title II disability benefits suspended or terminated on the basis of an initial determination that they have ceased to be disabled.

ANSWER:

From October 1, 1976 to November 30, 1978, of 364 continuing disability investigations of straight Title II beneficiaries, 143 initial DDA determinations were made that disability had ceased.

INTERROGATORY NO. 6:

From July 1, 1976 to the present, please state the total number of persons in Vermont who have requested reconsideration of any adverse straight Title II initial determinations holding that a disability did not or had ceased to exist.

ANSWER:

From October 1, 1976 to November 30, 1978, 642 persons in Vermont have requested reconsideration of initial DDA determinations of a denial or cessation of straight Title II disability.

INTERROGATORY NO. 7:

From July 1, 1976 to the present, please state the total number of persons in Vermont who have received reconsiderations approving straight Title II disability claims, and those who have had reconsiderations denying said claims.

ANSWER:

From October 1, 1976 to November 30, 1978, 137 requests for reconsiderations resulted in reversals to allowance or continuance and 505 resulted in affirmations of denial or cessation.

INTERROGATORY NO. 8:

For the period July 1, 1976 to the present, please give a month by month breakdown of the following information relating to straight Title II disability claims:

a. Number of claims filed

b. Number of favorable initial determinations

c. Number of unfavorable initial determinations

d. Number of initial determinations that a disability had ceased to exist

e. Number of favorable reconsideration determinations

f. Number of unfavorable reconsideration determinations

ANSWER:

See Attachment A.

INTERROGATORY NO. 9:

For the period of July 1, 1976 to the present, for each reconsideration of an adverse straight Title II disability initial determination made to date, please give the date of the request for reconsideration and the date the reconsideration determination was made.

ANSWER:

The information necessary to answer this Interrogatory is not readily available in the form requested. Defendant will provide, within three weeks after service of these Answers, a case-by-case breakdown for the period September-November, 1978 showing the date each straight Title II disability reconsideration case was received and released by DDA. The date of reconsideration determination would precede or coincide with the date of release. (See also footnote 1, page 6).

To provide the best possible answer available at this time, defendant herewith provides the average DDA processing times for the period January-November, 1978. These figures represent the time span between the date of receipt of the case and the date DDA completes its action and releases the case.[1]

Month	Mean Title II Reconsideration Processing Time
January 1978	17.4 days
February 1978	16.7 days
March 1978	28.4 days
April 1978	24.7 days
May 1978	24.7 days
June 1978	37.6 days
July 1978	51.7 days
August 1978	41.2 days
September 1978	48.6 days
October 1978	32.7 days
November 1978	48.2 days

Defendant's Objection To Interrogatory 9

Defendant objects to providing a further answer to Interrogatory 9 for the period July, 1976 to the present on the grounds that it is unduly burdensome to answer, overly broad in scope, and not reasonably calculated to lead to the discovery of admissible evidence.

INTERROGATORY NO. 10:

Please describe the present administrative process that ensues from the date a straight Title II disability reconsideration is requested until the date the reconsideration determination is made.

ANSWER:

When a reconsideration of a Title II disability determination denying or ceasing benefits is requested, the following events occur:

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[1] After DDA's actions are completed, some cases are sent to BDI in Baltimore for further action. See Answer to Interrogatory 10. BDI's processing times are not presently available.

The Social Security District Office, where the SSA-561 request for reconsideration (sample attached), is filed, will return the disability folder to the State DDA. If the disability folder is not in the District Office's possession at the time that the request is filed, steps will be taken to obtain the folder and route it to the DDA.

DDA will review the disability folder, relying on medical evidence previously obtained, additional medical evidence obtained as cited by the claimant on the request for reconsideration, and if indicated by the above, a purchased consultative examination, that is, one ordered and paid for by DDA, to document the folder more fully.

When all the evidence which is deemed necessary is on file, a decision is made either affirming the denial or cessation of benefits or reversing the prior decision, allowing or continuing benefits. From this point, initial denials and cessations are handled differently.

A. *Reconsideration of initial denials.* The disability folder is routed to the District Office after DDA action which releases the notice and generation of payment, if any will be forthcoming. The exception to this would be those unusual cases sent to BDI requiring special handling or random cases selected by computer for sample review (10% of all reconsiderations of initial denials).

Those cases which are selected for sample review are routed to BDI in Baltimore after the DDA has completed its processing of those cases. Some cases are returned to the DDA for additional development or, possibly, with a recommendation to change the determination. In these cases the DDA will usually comply with BDI's request, taking the necessary action, and then return the folder to BDI for release of the notice to the claimant and any necessary payment action.

B. *Reconsideration of Cessation of disability.* All these cases are routed to BDI in Baltimore after the DDA has made its determination. Prior to October 1978, all such reconsideration determinations were reviewed by BDI. Currently, all DDA reconsideration determinations re-

versing Title II disability cessation are still reviewed by BDI. As of October 1978, however, none of the DDA reconsideration decisions affirming Title II disability cessations are reviewed by BDI; these files are now sent to BDI in Baltimore only for mailing of the notice to the claimant.

Interrogatories 11-27 are answered by Judge Fischer, with Mr. Green also answering part of Interrogatories 15, 23 and 25. The figures provided in the following answers to Interrogatories 11-14 cover the period January 1, 1977 to December 15, 1978. Earlier records had been purged from the Hearing Office files.

INTERROGATORY NO. 11:

From July 1, 1976 to the present, please state the total number of persons in Vermont who have requested fair hearings following adverse reconsideration determinations upon straight Title II disability claims.

ANSWER:

From January 1977 to December 15, 1978, 342 persons in Vermont requested fair hearings following adverse reconsideration determinations upon straight Title II disability claims.

INTERROGATORY NO. 12:

From July 1, 1976 to the present, please give a month by month breakdown as to how many straight Title II diasbility fair hearing requests have been filed.

ANSWER:

See Attachment B.

INTERROGATORY NO. 13:

From July 1, 1976 to the present, please state how many fair hearings have been held on straight Title II disability claims.

ANSWER:

From January 1977, to December 15, 1978, 233 fair hearings have been held on straight Title II disability claims.

INTERROGATORY NO. 14:

From July 1, 1976 to the present, please give the date of request of each straight Title II disability fair hearing, the date of the hearing, and the date of the hearing decision.

ANSWER:

See Attachment C.

INTERROGATORY NO. 15:

Please describe the present administrative process that occurs from the date a straight Title II disability hearing request is received until the date of the hearing decision.

ANSWER:

The following description is provided by Mr. Green:

Requests for hearings are generally received at the Social Security District Office. If the District Office receives a written request which is not on the prescribed Form SSA-501 (see attached), it will complete the form and send it to the claimant for his signature. The District Office will also, on the same date of receipt, send the written request and a copy of the unsigned SSA-501

to the appropriate Hearing Office. (For Vermont claimants, the Hearing Office is located in Manchester, New Hampshire).

If the disability folder is in the possession of the District Office, it is sent to the Hearing Office along with the request for hearing. If the District Office does not have the disability folder, it will make a folder location query, teletype to the location (which usually is BDI in Baltimore) and request that the folder be sent to the District Office. When the folder is received by the District Office, it is forwarded to the Hearing Office.

The following description is provided by Judge Fischer:

When the request for hearing (SSA-501) is received by the Hearing Office with the claim file, the case is assigned to an administrative law judge. If the claim file is not received with the request for hearing, the District Office is notified and requested to locate the claims file.

When the case is assigned to an administrative law judge, the following pre-hearing development takes place: case controls are established; exhibits are identified and pulled; an exhibit list is prepared; the need for any additional pre-hearing development is identified; if consultation from a medical advisor (MA) or vocational expert (VE) is necessary, arrangements are made for the MA or VE to appear at the hearing; and an opening statement (chronological history of the case) is prepared.

The case is then scheduled for hearing and a notice of hearing is sent to all parties; the case control is updated.

If the administrative law judge determines that, during the course of either the hearing or post-hearing review, additional evidence is required to decide the case, then post-hearing development is initiated.

After the additional evidence is received, the decision is issued and the case control is updated.

INTERROGATORY NO. 16:

Please state how many persons are presently employed to hear straight Title II disability fair hearings in Vermont.

ANSWER:

Three administrative law judges assigned to the Manchester, N.H. Hearing Office hear straight Title II disability hearings in Vermont.

INTERROGATORY NO. 17:

Please state how many persons are presently needed to hear straight Title II disability fair hearings in Vermont.

ANSWER:

Three administrative law judges are needed to hear straight Title II disability hearings in Vermont.

INTERROGATORY NO. 18:

Please state whether Vermont fair hearing officers hear cases other than straight Title II disability cases. List all types of cases they hear.

ANSWER:

Vermont hearing officers hear, in addition to straight Title II disability cases, the following cases: Retirement/Survivors Insurance; Widow/Widower Disability Insurance; Health Insurance—Part A; SSI/Aged, SSI/Blind, SSI/Disability—concurrent with a Title II claim; Health Maintenance Organization; Provider Reimbursement Review Board; Professional Services Review Organization; Supplemental Medical Insurance Benefits; and Miscellaneous (non-Social Security matters).

INTERROGATORY NO. 19:

Please state the relationship and procedural differences, if any, between the scheduling of straight Title II disability hearings and the scheduling of Title XVI or concurrent Title II—Title XVI disability hearings in Vermont.

ANSWER:

Regional policy is that there are no procedural differences. Priorities in the scheduling of straight Title II disability hearings and the scheduling of Title XVI or concurrent Title II/XVI disability hearings are the same. Since January 1978 we have been attempting to schedule and hold all hearings within 90 days from the date of filing of the request for hearing. (See Answer to Interrogatory 24).

INTERROGATORY NO. 20:

Please explain the basis or standard procedure that exists for the scheduling of straight Title II disability hearings in Vermont and the assignments to individual hearing officers.

ANSWER:

All Vermont cases are assigned (in order of receipt) to the three administrative law judges in the Manchester Hearing Office. This assignment is done on a rotating basis for the three judges (the first case received is assigned to ALJ number one, the second case received is assigned to ALJ number two, etc.) Each ALJ arranges his or her own trip schedules (usually for a period of two months in advance). After a case is assigned to an ALJ, the hearing assigned to that ALJ will identify all cases to be heard at a particular hearing site so that these cases can be scheduled in the ALJ's next trip to that site.

INTERROGATORY NO. 21:

Please state any limitations or numerical ceilings upon the assignments of straight Title II disability hearings to hearing officers in Vermont.

ANSWER:

There are no limitations or numerical ceilings—individual dockets are monitored to maintain an average total number of cases equal to four months workload based on each judge's average production.

INTERROGATORY NO. 22:

If any emergency procedures exist to obtain additional hearing officers to hear straight Title II disability cases in Vermont, please describe these procedures, and when they are initiated.

ANSWER:

Intra- and inter-regional case transfers can be made if additional judges are needed and are available to handle the workload. Close monitoring of all dockets is maintained to alert us to the need for such workload adjusting procedures.

INTERROGATORY NO. 23:

Please estimate whether the average time in making straight Title II disability reconsiderations and scheduling hearings will change in the remainder of FY 1979 or in FY 1980. If so, explain why.

ANSWER:

(Answered by Mr. Green) The Social Security Administration's Boston Regional Office is constantly working to improve all DDA processing times, and we hope that these efforts will lead to a decrease in the Title II

reconsideration processing time during FY 79 and FY 80. However, these processing times can only be improved with the cooperation of claimants and all medical sources cited by the claimant. That is, unless all the information required to adjudicate a claim is forthcoming promptly when requested, the case will inevitably be delayed.

(Answered by Judge Fischer) We do not expect the average time for scheduling hearings to change in the remainder of FY 79 or in FY 80 as all cases will be treated in the same basis of priority.

INTERROGATORY NO. 24:

Please state why straight Title II disability cases cannot be scheduled within the same 90 day time span as presently is the case with Title XVI disability cases in Vermont.

ANSWER:

Our regional policy is to schedule and hold hearings on all claim types within a 90 day time span. However, this may not be possible in all cases because of logistical and scheduling problems due to distant travel. In the event that scheduling a Title II hearing within 90 days would interfere with the ability to meet the court order regarding Title XVI disability, the Title XVI case would have to be given priority. Also, we assist claimants in obtaining complex and specialized medical development; holding a hearing before such development is completed may be adverse to the best interest of the claimant and therefore some cases may not for that reason be scheduled within 90 days. In some cases completion of medical development has enabled an administrative law judge to determine that an applicant is disabled prior to holding a hearing.

INTERROGATORY NO. 25:

From July 1, 1976 to the present, please give the reversal rate of adverse straight Title II disability deci-

sions at both the reconsideration and fair hearing levels for Vermont, the region, and nationally.

ANSWER:

(Answered by Mr. Green) The DDA Title II reconsideration reversal rates from October 1, 1976 through November 30, 1978 are as follows:

Vermont DDA	21.3%
Boston Region	25.4%
Nation	22.6%

(Answered by Judge Fischer) The reversal rate at the fair hearing level for straight Title II disability decisions, from June 20, 1976 to December 15, 1978, is 56.2% for Vermont. The regional and national reversal rates, from June 20, 1976 to November 30, 1978, are 55.1% and 56.1% respectively.

INTERROGATORY NO. 26:

Please state if any new regulations are being considered to hasten the present administrative process in making or scheduling straight Title II disability reconsiderations or hearings. Please elaborate.

ANSWER:

Although no new regulations have yet been proposed, the Social Security Administration has begun consideration, at a very preliminary stage, of the feasibility of setting specific time frames for hearing cases and deciding appeals. However, some preliminary regional studies on the effects of the court-ordered time limitations in Maine indicate that adhering to strict time frames may have resulted in a marked increase in court-ordered remands, as well as in claimant's requests for postponements, and thus may have adversely affected some claimants.

INTERROGATORY NO. 27:

Please state or estimate when plaintiff Leon S. Day's fair hearing will be held.

ANSWER:

Leon Day's hearing was held on December 4, 1978.

INTERROGATORY NO. 28:

For plaintiff Leon S. Day, please describe what actions led to the determination that he had ceased to be disabled in the latter part of 1977.

ANSWER:

(Answered by Mr. Green) On September 3, 1976 the Vermont Disability Determination Agency determined that Leon S. Day was entitled to Title II disability benefits based on disability beginning December 5, 1975. Because Mr. Day's impairment was considered capable of improvement, a medical reexamination date of June, 1977, was noted. Pursuant to this notice, the Vermont DDA received the disability folder on August 15, 1977.

On August 17, 1977 a letter was sent to the beneficiary advising that a continuing disability investigation was to be conducted and requesting completion of the enclosed Form SSA-454a, Social Security Disabled Person Report (see attached).

On August 25, 1977 the completed SSA-454a was received from the beneficiary. The form stated that there had been no improvement in the impairment which had rendered the beneficiary disabled. Several sources of current medical evidence were cited.

After obtaining medical evidence of record (*i.e.*, from sources cited by claimant) from Dr. Satish Chawla, the Veteran's Administration Hospital at White River Junction, and the Springfield Hospital; and a purchased psychiatric consultative examination from Dr. Harold Rob-

bins, DDA advised the beneficiary of the proposed cessation by letter on October 4, 1977. DDA determined on October 17, 1977 that disability had ceased as of September, 1977 and benefits would be terminated as of November, 1977.

On October 21, 1977 the disability folder was then routed to the Bureau of Disability Insurance in Baltimore where it was received by the BDI, Division of Benefit Services on October 26, 1977.

On November 14, 1977 a letter was sent to the beneficiary advising him of the determination that disability had ceased as of September, 1977 and that benefits would terminate effective November, 1977.

INTERROGATORY NO. 29:

For plaintiff Leon S. Day, please describe all actions taken between the request for reconsideration and the holding of the fair hearing. This should include, but not be limited to transmission of files (to, from, where, when); development of case (what was done, where, when, how); gathering or attempts to gather additional medical evidence (when, where, how); and any other relevant actions.

ANSWER:

The following events, reported by Mr. Green, occurred in the case of Leon S. Day from the time of his request for reconsideration to the time of his request for a hearing:

On December 22, 1977 Leon S. Day filed a request for reconsideration, SSA-561, asking that the determination that disability had ceased be reviewed. The Social Security District Office in Rutland, on that same day, sent a teletype to the Bureau of Disability Insurance (BDI) in Baltimore requesting that the disability folder be sent to DDA immediately so that the reconsideration process could continue.

On January 25, 1978 the folder was received by the Vermont Disability Determination Agency (DDA).

On January 26, 1978 a determination upholding the cessation was made by the Vermont DDA.

On January 27, 1978 the folder was sent to BDI in Baltimore for review and release of notification to the claimant.

On January 31, 1978 the folder was received by BDI, Division of Benefit Services.

On March 10, 1978 the folder was selected as a Quality Assurance sample case by the BDI, Medical Consultant Staff.

On March 23, 1978, after review by the Medical Consultant Staff, the folder was returned to the Vermont DDA with the recommendation that a neurological consultative examination be obtained.

On April 3, 1978 the folder was received by the Vermont DDA.

On April 27, 1978 Dr. Peter P. Upton conducted a neurological consultative examination of the claimant.

On May 1, 1978 the report of the consultative examination was received by the Vermont DDA.

On May 18, 1978, based on the report of the consultative examination and newly acquired medical evidence of record from the Mary Hitchcock Memorial Hospital, Dartmouth-Hitchcock Medical Center, and Dr. Satish Chawla, a determination reopening and affirming the cessation of disability was made by the Vermont DDA.

On May 23, 1978 the folder was again routed to the BDI in Baltimore, where it was received by the BDI Medical Consultant Staff on May 31, 1978.

On June 5, 1978 the proposed cessation date of September, 1977 and termination of benefits effective November, 1977 was approved by BDI.

On June 6, 1978 a letter was sent to the claimant advising him that the cessation and termination of benefits had been upheld after reconsideration.

The following events, reported by Judge Fischer, occurred in the case of Leon S. Day from the time of his request for a hearing to the present:

On June 16, 1978 the Social Security District Office in Rutland received a letter, dated June 14, 1978, from Attorney Richard Munzing requesting a hearing on behalf of Leon Day. On the same day, George Bedard of the Rutland District Office prepared and signed Form SSA-501, Request for Hearing, set the acknowledgement date of June 14, 1978, and sent it to Attorney Richard Munzing to obtain Mr. Day's signature. A copy of SSA-501 was not sent to BHA Manchester at that time.

On August 11, 1978 the Rutland District Office received the Form SSA-501 from Attorney Munzing.

On August 14, 1978 BHA Manchester received a copy of the Form SSA-501 of Leon Day from the Rutland District Office.

On August 23, 1978 Christopher Field of the Rutland District Office sent a letter to Attorney Munzing asking him to come to either the Brattleboro District Office or the Rutland District Office to review the claim file of Leon Day.

On August 31, 1978 BHA Manchester received the claims file of Leon Day from the Rutland District Office. On the same day, the case was assigned to Administrative Law Judge Hermann. The case was to be scheduled for hearing in Brattleboro, Vermont during the next scheduled trip there.

On November 8, 1978 Attorney Munzing telephoned BHA Manchester, spoke to Pamela LaBreque, Clerk Stenographer, and requested that a hearing be scheduled for Leon Day as soon as possible.

On November 20, 1978 a hearing notice was mailed to Leon Day and Attorney Munzing.

A hearing was scheduled for and held on December 4, 1978 in the District Court Room, Old Post Office Building, White River Junction, Vermont. In attendance were Vir-

ginia Day, wife of the claimant, Attorney Munzing, Administrative Law Judge Robert Hermann, and Joy Williamson, Hearing Assistant. At the hearing, Attorney Munzing requested that the case be held open for two weeks in order for him to submit medical evidence and a brief. Judge Hermann granted the request.

On December 26, 1978 BHA Manchester received medical evidence and a brief submitted by Attorney Munzing. Judge Hermann's hearing decision affirming cessation was sent to Mr. Day on January 17, 1979.

As to the Objection to Interrogatory No. 9.

/s/ Anne M. Gulyassy
ANNE M. GULYASSY
Attorney, Department of Justice
Attorney for Defendant
10th & Pennsylvania Ave., N.W.
Washington, D.C. 20530

STATE OF MASSACHUSETTS)
) ss
COUNTY OF SUFFOLK)

I, Robert C. Green, being duly sworn, hereby depose and say that I am the Regional Commissioner, Boston Region, Social Security Administration, Department of Health, Education, and Welfare; that as such I am authorized to and do make this verification for and on behalf of the Secretary of Health, Education, and Welfare, acting by and through the Social Security Administration; further, that upon information furnished to me in good faith and on the basis of the best information available within SSA, the undersigned representative of the Secretary of the Department of Health, Education, and Welfare hereby declares that the aforesaid Answers to Plaintiff's Interrogatories are true to the best of my knowledge, information, and belief.

/s/ Robert C. Green
ROBERT C. GREEN
Regional Commissioner, Boston Region
Social Security Administration
Department of Health, Education, and Welfare

Subscribed and sworn to before
me this 23rd day of January
1979.

/s/ Janet L. (illegible)
Notary Public

My Commission expires: September 14, 1984

STATE OF MASSACHUSETTS)
) ss
COUNTY OF SUFFOLK)

I, Harold H. Fischer, being duly sworn, hereby depose and say that I am the Regional Chief Administrative Law Judge, Boston Region, Bureau of Hearings and Appeals, Social Security Administration, Department of Health, Education, and Welfare; that as such I am authorized to and do make this verification for and on behalf of the Secretary of the Department of Health, Education, and Welfare, acting by and through the Social Security Administration, and the Bureau of Hearings and Appeals; further, that upon information furnished to me in good faith and on the basis of the best information available within the Bureau of Hearings and Appeals, the undersigned representative of the Secretary of the Department of Health, Education, and Welfare hereby declares that the aforesaid Answers to Plaintiff's Interrogatories are true to the best of my knowledge, information, and belief.

/s/ Harold H. Fischer
HAROLD H. FISCHER
Regional Chief Administrative Law Judge
Bureau of Hearings and Appeals
Social Security Administration
Department of Health, Education, and Welfare

Subscribed and sworn to before
me this 22nd day of January
1979.

/s/ Janet L. (illegible)
Notary Public

My Commission expires: Sept. 14, 1984

ATTACHMENT A

Title II Claims Processed by Vermont DDA

Month	a Title II Total	b Initial Favorable	c Initial Unfavorable	d Cessations	e Favorable Reconsiderations	f Unfavorable Recons.
10/76	157	78	79	12	11	15
11/76	158	87	71	4	3	18
12/76	168	95	73	7	6	26
1/77	104	53	51	3	8	21
2/77	107	63	44	0	6	2
3/77	174	97	77	6	7	23
4/77	163	81	82	0	6	14
5/77	201	97	104	12	2	13
6/77	220	111	109	19	8	30
7/77	144	68	76	7	9	24
8/77	163	77	86	7	4	31
9/77	129	70	59	9	6	13
10/77	218	130	88	9	8	35
11/77	96	55	41	4	8	21
12/77	141	80	61	2	2	15
1/78	101	52	49	5	1	26
2/78	108	57	51	7	5	23
3/78	126	81	45	8	6	29
4/78	127	70	57	4	3	25
5/78	139	69	70	1	5	7
6/78	122	72	50	1	8	15
7/78	75	45	30	6	3	12
8/78	89	43	46	4	3	9
9/78	135	71	64	2	4	23
10/78	123	67	56	1	3	13
11/78	100	45	55	3	2	22
Totals	3588	1914	1674	143	137	505

ATTACHMENT B

#12—Monthly Breakdown of Vermont Straight Title II Disability Requests of Hearings

	1977	1978 (to 12/15/78)
January	12	18
February	11	9
March	14	11
April	10	24
May	13	20
June	21	17
July	13	10
August	19	7
September	19	9
October	21	13
November	17	13
December	11	10
TOTAL	181	161

ATTACHMENT C

Date of Request for Hearing	Date(s) of Hearing(s) Scheduled	Date of Hearing	Date of Hearing Decision
6/19/78	9/20/78	9/20/78	9/29/78
2/28/78	7/13/78	7/13/78	11/29/78
1/20/78	7/12/78	7/12/78	7/31/78
1/5/78	4/14/78 [sic]	4/12/78	8/30/78
9/18/78	11/7/78	11/7/78	11/21/78
2/7/78	7/12/78	7/12/78	7/31/78
3/17/78	7/7/78	7/7/78	10/31/78
8/3/76	11/18/76	5/12/77	7/18/77
	12/9/77 [sic]		
	2/18/77		
	5/12/77		
11/8/76	1/21/77	1/21/77	7/29/77
12/10/76	5/26/77	8/12/77	11/9/77
	8/12/77		
12/17/76	5/27/77	5/27/77	6/30/77
12/28/76	5/5/77	5/5/77	6/30/77
12/29/76	8/16/77 [sic]	8/16/66	12/30/77
1/4/77	6/17/77	6/17/77	7/18/77
1/4/77	5/27/77	6/16/77	7/18/77
	6/16/77		
1/10/77	6/16/77	6/28/77	7/18/77
	6/28/77		
1/10/77	5/26/77	6/21/77	12/30/77
	6/21/77		
1/11/77	5/20/77	8/18/77	11/28/77
	6/22/77		
	8/18/77		
1/18/77	5/12/77	5/29/77	7/18/77
	5/29/77		
1/19/77	5/27/77	5/27/77	8/29/77
1/25/77	5/27/77	5/27/77	7/18/77
2/1/77	6/16/77	6/16/77	11/9/77
2/2/77	6/22/77	8/17/77	8/31/77
	8/17/77		
2/3/77	5/26/77	5/26/77	12/30/77
2/9/77	5/20/77	6/23/77	8/17/77
	6/7/77		
	6/23/77		
2/17/77	5/27/77	5/27/77	11/30/77
2/22/77	6/22/77	6/22/77	7/29/77
2/22/77	6/22/77	6/22/77	8/17/77
2/23/77	6/22/77	6/22/77	8/31/77
2/25/77	6/21/77	6/21/77	8/26/77
4/6/77	8/16/77	8/16/77	9/6/77

NOTE: This information was obtained from a manual audit of the hearing decisions issued through December 15, 1978.

Date of Request for Hearing	Date(s) of Hearing(s) Scheduled	Date of Hearing	Date of Hearing Decision
4/7/77	6/29/77	6/29/77	8/22/77
4/13/77	6/17/77	6/17/77	8/31/77
4/21/66 [sic]	6/27/77	6/27/77	7/29/77
4/28/77	6/17/77	6/17/77	8/29/77
4/28/77	6/15/77	6/15/77	8/31/77
6/21/77	10/12/77	10/12/77	6/29/78
7/21/77	9/21/77	9/21/77	10/26/77
7/26/77	9/23/77	9/23/77	11/20/77
7/26/77	8/26/77 11/3/77 2/3/78	2/3/78	5/31/78
7/28/77	9/21/77	9/21/77	10/21/77
7/28/77	10/4/77	10/4/77	12/21/77
9/12/77	1/5/78	1/5/78	1/25/78
9/14/77	12/6/77	12/6/77	12/21/77
9/8/77	1/6/78	1/6/78	2/17/78
9/13/77	11/16/77 2/23/78	2/23/78	withdrawal
9/23/77	1/6/78	1/6/78	1/26/78
11/22/77	1/17/78	1/17/78	1/27/78
12/19/77	4/4/78	4/4/78	6/13/78
1/24/78	4/4/78	4/4/78	5/31/78
12/3/76	5/12/77	5/12/77	1/31/78
11/22/77	1/17/78	1/17/78	1/27/78
8/24/77	10/6/77	10/6/77	2/15/78
8/17/77	10/4/77 1/19/78	1/19/78	2/28/78
8/24/77	10/7/77 3/16/78	3/16/78	3/31/78
8/29/77	10/20/77	10/20/77	3/20/78
8/1/77	10/18/77	10/18/77	2/28/78
10/28/77	1/18/78	[sic] 1/18/77	2/9/78
12/15/77	3/16/78	3/16/78	3/27/78
11/23/77	2/15/78	2/15/78	2/27/78
10/20/77	12/21/77 1/18/78	1/18/78	5/15/78
8/26/77	11/8/77 1/14/78	1/14/78	8/21/78
11/15/77	1/16/78 2/15/78	2/15/78	2/27/78
9/8/77	12/9/77	12/9/77	2/28/78
10/17/77	12/14/77	12/14/77	1/11/78
11/1/77	1/20/78	1/28/78	1/30/78
10/28/77	12/5/77 1/17/78	1/17/78	1/22/78
11/25/77	2/17/78	2/17/78	4/12/78
11/9/77	12/15/77 2/17/78	2/17/78	2/28/78

Date of Request for Hearing	Date(s) of Hearing(s) Scheduled	Date of Hearing	Date of Hearing Decision
5/24/77	8/4/77 12/20/77	12/20/77	1/23/78
11/23/77	2/15/78	2/15/78	2/24/78
8/29/77	12/8/77	12/8/77	1/27/78
10/7/77	11/17/77 1/17/78	1/17/78	2/3/78
8/17/77	3/14/78	3/14/78	3/24/78
10/20/77	12/7/77 1/18/78	1/18/78	5/15/78
10/25/77	12/22/77	12/22/77	1/31/78
10/7/77	12/20/77	12/20/77	4/21/78
8/22/77	10/27/77	10/27/77	8/21/78
5/27/77	10/6/77 2/16/78	2/16/78	3/31/78
5/25/77	8/18/77	8/18/77	2/15/78
6/21/78	8/1/78	8/1/78	9/19/78
5/11/78	7/27/78	7/27/78	8/21/78
6/16/78	9/29/78	9/29/78	10/25/78
4/11/78	7/26/78	7/26/78	8/30/78
8/18/78	11/9/78	11/9/78	11/21/78
5/25/78	9/28/78	9/28/78	10/25/78
6/2/78	9/28/78	9/28/78	10/25/78
6/11/78	10/4/78	10/4/78	10/25/78
7/18/78	11/8/78	11/8/78	11/22/78
5/5/78	7/26/78	7/26/78	8/21/78
4/10/78	6/14/78	6/14/78	7/24/78
4/24/78	6/14/78	6/14/78	9/27/78
1/27/78	7/28/78	7/28/78	8/30/78
10/1/76	3/24/77	3/24/77	6/28/77
10/20/76	4/4/77	4/4/77	6/28/77
3/24/77	6/29/77	6/29/77	7/29/77
6/27/77	10/4/77	10/4/77	11/3/77
3/14/77	6/28/77	6/28/77	8/31/77
7/20/76	3/22/77	3/22/77	6/28/77
3/14/77	6/28/77	6/28/77	7/29/77
6/6/77	11/9/77	11/9/77	11/21/77
2/17/77	5/24/77 10/26/77	10/26/77	11/29/77
10/26/76	4/6/77	4/6/77	4/29/77
11/19/76	4/6/77	4/6/77	4/29/77
6/1/77	9/20/77	9/20/77	10/14/77
6/20/77	10/4/77	10/4/77	11/2/77
6/15/77	10/5/77	10/5/77	11/3/77
3/24/77	7/14/77	7/14/77	7/29/77
9/8/77	11/10/77	11/10/77	11/29/77
10/15/76	4/4/77	4/4/77	6/22/77
6/16/77	10/4/77	10/4/77	11/28/77

Date of Request for Hearing	Date(s) of Hearing(s) Scheduled	Date of Hearing	Date of Hearing Decision
3/23/77	6/29/77 10/6/77	10/6/77	11/22/77
9/27/76	1/25/77	1/25/77	2/16/77
10/6/76	3/24/77	3/24/77	3/31/77
11/1/76	4/4/77	4/4/77	7/29/77
9/1/76	1/25/77	1/25/77	5/23/77
6/14/77	9/21/77	9/21/77	10/19/77
9/12/77	11/10/77	11/10/77	11/16/77
6/3/77	11/9/77	11/9/77	11/28/77
3/31/77	7/12/77	7/12/77	7/29/77
9/15/77	11/9/77	11/9/77	11/29/77
6/22/77	10/6/77	10/6/77	11/4/77
5/25/77	9/20/77	9/20/77	11/23/77
10/19/77	1/10/78	1/10/78	2/13/78
1/6/78	3/15/78	3/15/78	3/31/78
11/28/77	3/1/78	3/1/78	10/10/78
1/24/78	3/1/78 4/20/78	4/20/78	5/4/78
3/13/78	5/9/78	5/9/78	6/19/78
3/13/78	5/22/78	5/22/78	6/15/78
11/10/77	1/11/78	1/11/78	1/20/78
11/7/77	1/24/78	1/24/78	1/30/78
2/23/78	7/11/78	7/11/78	7/28/78
5/19/78	8/15/78	8/15/78	10/6/78
11/28/77	2/27/78	2/27/78	3/13/78
2/10/78	4/19/78	4/19/78	9/20/78
12/16/77	3/14/78	3/14/78	3/31/78
5/10/78	7/13/78	7/13/78	7/28/78
10/19/77	1/11/78 & 5/22/78	5/22/78	8/29/78
2/10/78	4/18/78	4/18/78	4/26/78
12/29/77	3/1/78	3/1/78	3/13/78
10/26/77	1/25/78	1/25/78	1/31/78
11/2/77	1/26/78 6/7/78	6/7/78	7/17/78
2/6/78	6/6/78	6/6/78	10/12/78
6/16/77	9/22/77	9/22/77	7/31/78
6/16/78	8/15/78	8/15/78	9/14/78
6/8/78	8/16/78	8/16/78	9/12/78
2/9/78	3/16/78	3/16/78	3/31/78
5/16/78	8/17/78	8/17/78	11/22/78
11/16/77	2/28/78	2/28/78	3/13/78
2/16/78	4/17/78	4/17/78	7/27/78
1/23/78	4/17/78	4/17/78	4/26/78
6/22/78	8/16/78	8/16/78	9/12/78
11/1/77	1/25/78	1/25/78	1/30/78
5/3/78	6/6/78	6/6/78	6/14/78
4/11/78	7/13/78	7/13/78	10/30/78

Date of Request for Hearing	Date(s) of Hearing(s) Scheduled	Date of Hearing	Date of Hearing Decision
12/22/77	3/29/78	[sic] 3/39/78	3/31/78
11/29/77	3/16/78	3/16/78	4/27/78
10/26/77	1/26/78	1/26/78	3/24/78
3/20/78	5/24/78	9/14/78	11/9/78
	9/14/78		
2/16/78	4/19/78	4/19/78	4/26/78
1/19/78	3/27/78	3/27/78	6/30/78
6/13/77	9/21/77	9/21/77	1/16/78
11/16/77	1/24/78	1/24/78	2/27/78
4/7/78	7/13/78	7/13/78	9/12/78
2/7/78	4/19/78	4/19/78	4/28/78
2/27/78	4/20/78	4/20/78	4/28/78
1/27/78	3/15/78	3/15/78	3/24/78
1/12/78	3/27/78	3/27/78	5/31/78
1/3/78	3/15/78	6/6/78	7/31/78
	6/6/78		
12/14/77	3/28/78	3/28/78	4/13/78
10/7/77	1/10/78	1/10/78	2/28/78
10/20/77	1/10/78	5/22/78	10/30/78
	5/22/78		
9/21/77	11/29/77	9/15/78	11/9/78
	9/15/78		
3/29/78	6/8/78	6/8/78	6/30/78
11/22/77	4/17/78	4/17/78	4/28/78
4/4/78	8/31/78	8/31/78	10/27/78
7/14/77	9/23/77	10/28/77	3/30/78
	10/28/77		
7/18/77	10/28/77	10/28/77	1/12/78
10/3/77	10/28/77	10/28/77	4/14/78
3/29/78	8/30/78	8/30/78	11/22/78
7/15/77	9/22/77	9/22/77	12/9/77
7/21/77	9/20/77	10/26/77	4/10/78
	10/26/77		
4/10/78	8/30/78	8/30/78	9/27/78
8/24/78	8/31/78	8/31/78	10/23/78
5/15/78	8/31/78	8/31/78	10/23/78
11/30/77	1/27/78	1/27/78	2/13/78
4/18/78	8/30/78	8/30/78	10/31/78
7/25/77	9/20/77	9/20/77	12/9/77
7/29/77	9/20/77	9/20/77	1/3/78
7/29/77	9/20/77	9/20/77	1/3/78
8/23/77	10/26/77	10/26/77	5/24/78
6/30/77	10/27/77	11/17/77	1/26/78
	11/17/78 [sic]		
7/26/77	9/22/77	9/22/77	12/9/77
5/17/77	8/26/77	10/27/77	12/14/77
	9/8/77		
	10/27/77		

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Civil Action No. 78-266

LEON S. DAY, PLAINTIFF

v.

JOSEPH A. CALIFANO, JR., Secretary,
United States Department of Health,
Education, and Welfare, DEFENDANT

ANSWER TO VERIFIED COMPLAINT OF INTERVENING PLAINTIFF AMEDIE MAURAIS

The defendant hereby answers the intervening plaintiff's Complaint as follows:

FIRST DEFENSE

The Verified Complaint of Intervening Plaintiff Amedie Maurais fails to state a claim upon which relief can be granted.

SECOND DEFENSE

The Court lacks jurisdiction over the subject matter of this action.

THIRD DEFENSE

The intervening plaintiff's Complaint does not present a justiciable case or controversy.

FOURTH DEFENSE

Mandamus will not lie against the named defendant to control the exercise of administrative judgment and discretion.

FIFTH DEFENSE

In response to the numbered allegations of the intervening plaintiff's Complaint, defendant answers as follows:

1. Defendant incorporates by reference his answer to paragraph 1 of the Amended Complaint of Leon Day.

2. Defendant incorporates by reference his answers to paragraphs 2, 3 and 4 of the Amended Complaint of Leon Day.

3. Defendant incorporates by reference his answers to paragraph 5 of the Amended Complaint of Leon Day.

4. Admit, except to allege affirmatively that his disability benefits were terminated effective November 30, 1977.

5. Defendant incorporates by reference his answers to paragraphs 6 and 7 of the Amended Complaint of Leon Day.

6. The first sentence is denied, and defendant alleges that plaintiff intervenor was determined to be disabled on April 20, 1976, with a disability onset date of April 3, 1975. The remainder of this paragraph is admitted, except that plaintiff intervenor collected disability benefits until April, 1978.

7. Admit, except to allege affirmatively that intervenor's request for reconsideration dated June 2, 1978 was received on June 5, 1978.

8. Defendant admits that no reconsideration determination had been made at the time of filing of the plaintiff Intervenor's Complaint, but that a notice of determination on reconsideration of disability was sent on January 4, 1979.

9. Deny first sentence. Defendant is without information or knowledge sufficient to form a belief as to the truth of the remaining allegations of this paragraph, and therefore they are denied.

10. Deny first sentence. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of this paragraph, and therefore they are denied.

11. Defendant incorporates by reference his answers to paragraphs 8 through 14 of the Amended Complaint of Leon Day.

12. Defendant incorporates by reference his answers to paragraphs 15 through 20 of the Amended Complaint of Leon Day.

13. Defendant incorporates by reference his answers to paragraphs 21 through 31 of the Amended Complaint of Leon Day.

14. This paragraph incorporates by reference the Prayer for Relief in the Amended Complaint of Leon Day and therefore does not require an answer.

The defendant denies all allegations in plaintiff's Amended Complaint not specifically admitted, denied, or qualified hereinabove.

WHEREFORE, defendant prays that the Amended Complaint be dismissed and that it be granted its costs in this litigation and such other and further relief as may be deemed just and proper.

Respectfully submitted,

/s/ Barbara Allen Babcock
BARBARA ALLEN BABCOCK
Assistant Attorney General
Civil Division

WILLIAM E. GRAY
United States Attorney

PETER W. HALL
Assistant United States Attorney

/s/ Paul Blankenstein
PAUL BLANKENSTEIN

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Department of Health, Education,
and Welfare

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Civil Action No. 78-266

LEON S. DAY, PLAINTIFF

v.

JOSEPH A. CALIFANO, JR., Secretary,
United States Department of Health,
Education, and Welfare, DEFENDANT

ANSWER TO AMENDED COMPLAINT

The defendant hereby answers the Amended Complaint as follows:

FIRST DEFENSE

The Amended Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

The Court lacks jurisdiction over the subject matter of this action.

THIRD DEFENSE

The Amended Complaint does not present a justiciable case or controversy.

FOURTH DEFENSE

Mandamus will not lie against the named defendant to control the exercise of administrative judgment and discretion.

FIFTH DEFENSE

In response to the numbered allegations of the Amended Complaint, defendant answers as follows:

1. This paragraph contains plaintiff's characterization of this action to which no answer is required, but insofar as an answer may be deemed required, deny.

2.-4. These paragraphs contain plaintiff's jurisdictional allegations to which no answer is required, but insofar as an answer may be deemed required, deny.

5.-7. Admit.

8. Admit, except to allege affirmatively that plaintiff's disability was found to have ceased in September, 1977 and that the combined monthly benefit to plaintiff and his family had been $723.00 prior to termination of entitlement.

9. Admit.

10. Admit, except to allege affirmatively that the determination was made June 5, 1978 and sent to plaintiff on June 6, 1978.

11. Admit.

12. Defendant admits that a hearing had not been held at the time of filing of the Amended Complaint, but alleges affirmatively that plaintiff's hearing was scheduled and held on December 4, 1978. Defendant admits the second sentence of this paragraph.

13. The first sentence is denied. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph, and therefore they are denied.

14. Deny.

15. Deny, except to admit the first sentence.

16. Deny, except to admit plaintiff has initiated discovery by Interrogatories.

17-18. Deny.

19. The first sentence is denied. Defendant is without information or knowledge sufficient to form a belief as to the truth of the allegations in the second sentence, and therefore they are denied.

20. Deny.

21.-24. Admit.

25. Deny.

26. Defendant's answers to paragraphs 21-23 are hereby adopted by reference as though they were fully set forth herein.

27. Deny, except to admit that the quoted words are found in 5 U.S.C. §§ 555(b), (e), and 706(1), and the Court is referred to the statutes for a full and complete statement of their contents.

28. Deny.

29. Defendant's answers to paragraphs 21-23 are hereby adopted by reference as though they were fully set forth herein.

30. Admit.

31. Deny.

The remaining paragraphs constitute plaintiff's prayer for relief and do not require an answer.

The defendant denies all allegations in plaintiff's amended Complaint not specifically admitted, denied, or qualified hereinabove.

WHEREFORE, defendant prays that the Amended Complaint be dismissed and that it be granted its costs in this litigation and such other and further relief as may be deemed just and proper.

Respectfully submitted,

/s/ Barbara Allen Babcock
BARBARA ALLEN BABCOCK
Assistant Attorney General
Civil Division

WILLIAM E. GRAY
United States Attorney

PETER W. HALL
Assistant United States Attorney

/s/ Paul Blankenstein
PAUL BLANKENSTEIN

/s/ Anne M. Gulyassy
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DONNA MCCARTHY, Esquire
Assistant Regional Attorney
Department of Health, Education,
and Welfare

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Civil Action No. 78-266

LEON S. DAY, PLAINTIFF

v.

JOSEPH A. CALIFANO, JR., Secretary,
United States Department of Health,
Education, and Welfare, DEFENDANT

SUPPLEMENT TO DEFENDANT'S ANSWERS TO PLAINTIFF'S INTERROGATORIES

Now comes the defendant, Secretary of the Department of Health, Education, and Welfare, by his attorneys, and hereby supplements his answer to interrogatory 9 by providing a case-by-case breakdown of reconsideration determinations of adverse straight Title II disability initial determinations. The following data is provided: 1) the date each case for reconsideration was received in the DDA; and 2) the date each case, after reconsideration determination, was cleared from the DDA. The date of the actual request for reconsideration and reconsideration determination would precede or coincide with the date of receipt or clearance respectively.

These figures were derived from the Social Security Case Control Computer System which records file folder movement. DDA's dates of receipt and clearance are obtained from the list of cases cleared from the Social Security Case Control System for the period September through December 1978.[1] Defendant notes that some cases are sent to BDI in Baltimore after DDA's actions are completed. BDI's actual processing times are not available. However, all action on a case would have been completed before the case was cleared from the Social Security Gas Control System.

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[1] Periodically, certain information is purged from the computer. Thus, these figures are not available prior to September 1978.

CASES CLEARED FROM THE CASE CONTROL SYSTEM IN 9/78

Date Received in DDA	Date Cleared from DDA
7/10/78	8/24/78
7/5/78	8/15/78
8/14/78	8/17/78
7/31/78	8/29/78
5/11/78	8/29/78
6/26/78	8/18/78
8/9/78	8/17/78
5/1/78	8/15/78
7/25/78	8/18/78
7/25/78	9/5/78
5/15/78	7/13/78
7/31/78	9/6/78
7/25/78	8/28/78
8/25/78	9/11/78
8/9/78	9/11/78
5/30/78	8/30/78
8/18/78	9/13/78
6/12/78	9/13/78
7/5/78	8/2/78
4/28/78	9/14/78
12/27/77	3/8/78
8/4/78	8/24/78
8/18/78	9/19/78
8/18/78	9/20/78
6/27/78	7/7/78
7/25/78	8/4/78
7/31/78	8/10/78
9/1/78	9/21/78
8/18/78	9/18/78
5/30/78	9/18/78
3/13/78	9/13/78
7/10/78	9/26/78
8/4/78	9/20/78
2/27/78	3/7/78
5/30/78	6/21/78
3/1/78	6/22/78
8/18/78	8/25/78

CASES CLEARED FROM THE CASE CONTROL SYSTEM IN 10/78

Date Received in DDA	Date Cleared from DDA
8/30/78	9/21/78
9/12/78	9/28/78
4/14/78	4/19/78

Date Received in DDA	Date Cleared from DDA
8/4/78	10/4/78
9/19/78	10/3/78
8/4/78	10/6/78
12/20/77	5/9/78
6/28/78	9/28/78
9/6/78	9/26/78
9/25/78	10/3/78
9/6/78	10/5/78
9/14/78	10/10/78
9/15/78	10/3/78
8/14/78	10/2/78
9/6/78	10/2/78
7/25/78	10/5/78
10/12/78	10/13/78
10/4/78	10/13/78
9/6/78	10/6/78
9/28/78	10/10/78
8/4/78	10/5/78
8/23/78	9/7/78
8/9/78	9/11/78
6/26/78	10/25/78
8/9/78	10/11/78
9/21/78	10/26/78

CASES CLEARED FROM THE CASE CONTROL SYSTEM IN 11/78

Date Received in DDA	Date Cleared from DDA
8/25/78	9/26/78
9/25/78	10/23/78
10/6/78	10/30/78
8/30/78	10/17/78
10/11/78	10/31/78
6/16/78	10/31/78
10/12/78	11/2/78
8/30/78	10/27/78
8/23/78	10/27/78
9/14/78	11/9/78
10/16/78	10/20/78
10/26/78	11/15/78
7/25/78	11/6/78
10/2/78	10/13/78
11/21/78	11/22/78

CASES CLEARED FROM THE CASE CONTROL SYSTEM
IN 12/78

Date Received in DDA	Date Cleared from DDA
10/17/78	11/20/78
10/17/78	11/27/78
10/23/78	11/17/78
9/25/78	11/24/78
10/19/78	11/28/78
11/14/78	11/28/78
7/5/78	10/5/78
10/18/78	11/21/78
5/22/78	10/24/78
10/11/78	11/2/78
10/23/78	11/27/78
9/28/78	12/5/78
10/30/78	11/22/78
10/20/78	12/1/78
11/17/78	11/24/78
8/9/78	11/27/78
10/26/78	12/6/78
7/25/78	8/1/78
11/7/78	12/7/78
10/13/78	11/29/78
10/10/78	12/7/78
10/26/78	12/8/78
12/29/77	12/4/78
11/27/78	12/15/78
11/21/78	11/22/78
12/4/78	12/12/78
11/14/78	12/11/78
11/8/78	11/21/78
11/17/78	11/27/78
8/10/78	11/7/78
11/21/78	11/28/78
11/29/78	12/19/78

STATE OF MASSACHUSETTS)
) ss
COUNTY OF SUFFOLK)

I, Robert C. Green, being duly sworn, hereby depose and say that I am the Regional Commissioner, Boston Region, Social Security Administration, Department of Health, Education, and Welfare; that as such I am authorized to and do make this verification for and on behalf of the Secretary of Health, Education, and Welfare, acting by and through the Social Security Administration; further, that upon information furnished to me in good faith and on the basis of the best information available within SSA, the undersigned representative of the Secretary of the Department of Health, Education, and Welfare hereby declares that the aforesaid supplemental answers to Plaintiff's Interrogatories are true to the best of my knowledge, information, and belief.

/s/ Robert C. Green
ROBERT C. GREEN
Regional Commissioner, Boston Region
Social Security Administration
Department of Health, Education, and Welfare

Subscribed and sworn to before
me this 13th day of February
1979.

/s/ Janet L. (illegible)
Notary Public

My Commission expires: September 14, 1984

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Civil Action File No. 78-266

LEON S. DAY and AMEDIE MAURAIS, on behalf of themselves and all others similarly situated

v.

JOSEPH A. CALIFANO, JR., Secretary, United States Department of Health, Education and Welfare

OPINION AND ORDER

In this action former recipients of Social Security disability benefits seek declaratory and injunctive relief against the Secretary of HEW for what they characterize as unreasonable and unlawful delays in the scheduling of hearings and in the issuance of decisions. The court has mandamus jurisdiction under 28 U.S.C. § 1361 to hear this case. It is presently before the court on plaintiffs' motion for class certification which is opposed by defendant. The issue has been briefed and argued by both parties.

Background:

Plaintiff Day was informed in December 1977 that the Secretary had determined claimant was no longer disabled and that the monthly benefits he had been receiving for two years were terminated. Plaintiff immediately filed a request for reconsideration. On June 6, 1978 the defendant issued a notice of reconsideration, affirming the earlier decision. On June 14 plaintiff requested a fair hearing of the reconsideration decision. At the time plaintiff Day filed this action on November 24, 1978, the defendant had yet to schedule a hearing date. A hearing was subsequently held on December 4, 1978 and a decision, reaffirming the cessation of benefits, was issued on January 17, 1979.

Plaintiff Amedie Maurais was notified in April of 1978 that in November 1977 his disability had ceased to exist and that he had been overpaid more than $2,000.00 in benefits. On June 2, 1978 he requested a reconsideration and a waiver of recoupment. The defendant had not issued a notice of reconsideration as of December 1, 1978, when Mr. Maurais filed his motion to intervene in this suit. The notice was subsequently received and a hearing was scheduled and held on March 29, 1979. At oral argument counsel for the Secretary informed the court that this claimant had received a favorable administrative decision.

Plaintiffs claim that the delays of 249 and 340 days between their initial requests for reconsideration and the eventual administrative hearings are unreasonable delays. They seek declaratory relief that these delays violate Title II of the Social Security Act at 42 U.S.C. § 405 (b), the Administrative Procedure Act at 5 U.S.C. §§ 555(b) and (e), and the Due Process Clause of the Fifth Amendment to the U.S. Constitution. Plaintiffs also seek injunctive relief restraining defendant from continuing this pattern of lengthy delay. The class which they seek to certify is "all present and future Vermont residents seeking to secure Social Security disability benefits following an initial determination by the Secretary that no disability exists, and who experience an unreasonable delay in the scheduling of and/or issuance of decisions in reconsiderations and fair hearings."

Discussion:

To maintain a class action the plaintiff must first meet the prerequisites set forth at Fed.R.Civ.P. 23(a):

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or

> defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Although the defendant argued that common questions of fact are not involved, it was conceded, and the court agrees, that there are common questions of law and that joinder of all members is impracticable. Defendant contends, however, that plaintiffs do not meet prerequisites (3) and (4).

The defendant maintains that plaintiffs are not typical of the class they seek to represent because they are not claimants seeking reconsideration of an initial denial of benefits, but rather claimants seeking reconsideration of a determination that disability had ceased. Because of this distinction, according to defendant, the delays the named plaintiff experienced were atypical of the average claimant.

Plaintiffs contend that this is a distinction without a difference and proffer their own statistical analysis tending to show that long delays are experienced by claimants generally. Regardless of whether purported class members' benefits were terminated or initially denied, plaintiffs claim that they are representative and typical of all claimants who have suffered unreasonably long delays.

The meaning of "typical" as used in Rule 23(a)(3) has been the subject of much interpretation; the true import is not settled. *See, e.g.*, 3B Moore's Federal Practice § 23.06-2 at 23-325 (the requirement of typicality is duplicative of other provisions in Rule 23(a) and has no independent meaning); *but see Taylor* v. *Safeway Stores, Inc.*, 524 F.2d 263, 269-270 (10th Cir. 1975) (the requirement of typicality is independent of Rules 23(a)(2) and (4) and requires the plaintiff to prove that a class exists by comparing his claims and defenses with those of the purported class). Whatever interpretation may be assigned to this prerequisite, it is clear that typical does not mean identical. *Wofford* v. *Safeway Stores,*

Inc., 78 F.R.D. 460, 475 (N.D.Cal. 1978); *Cohen* v. *Uniroyal, Inc.*, 77 F.R.D. 685 (E.D.Pa. 1977); *Parker v. Bell Helicopter Co.*, 78 F.R.D. 507, 511 (N.D.Tex. 1978). For a plaintiff to be representative of a class, his interests need only be "sufficiently aligned," (*Wofford, supra* at 475), "coextensive with," (*Cohen, supra* at 691), or demonstrate that the members of the purported class suffer the same or similar grievance, (*Carter* v. *Newsday, Inc.*, 76 F.R.D. 9, 14 (E.D.N.Y. 1976). The plaintiff is regarded as representative of the class when their interests are mutual and not antagonistic. *Women's Committee for Equal Employment Opportunity* v. *National Broadcasting Co., Inc.*, 71 F.R.D. 666, 670 (S.D.N.Y. 1976).

Plaintiff has demonstrated that there exist numerous claimants who have experienced extensive delays in obtaining administrative hearings. Whether the class members are seeking reversal of an initial denial or of a cessation of benefits determination is immaterial for purposes of Rule 23(a)(3) as long as they experienced unreasonable and excessive delay. Moreover, plaintiffs have defined their class to exclude those claimants who obtain reasonably prompt hearings. Such claimants are not to be represented in the proposed class.

Defendant also contends that plaintiffs are not representative because of the possibility of antagonism of interests between the class and the plaintiff in that some claimants may prefer a substantial delay in the hope that a longer consideration of their claim will be advantageous to their claims. While this argument has some merit, it is not sufficient to defeat certification of the class. Should the court decide on the merits to grant relief favorable to the plaintiffs, it is possible to fashion relief to accommodate those members not interested, by providing for their waiver of a speedy decision.

Defendant urges that since the plaintiffs' individual claims have been rendered moot by the eventual scheduling of hearings and issuance of decisions, they cannot

fairly and adequately protect the interests of the class within the meaning of Rule 23(a)(4). The general rule is that there must be an actual controversy between the class representative and the defendant at the time the class is certified.

Without deciding whether or not plaintiffs' individual claims are moot, the court is satisfied that their complaints present the kind of issue that is "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *I.C.C.*, 219 U.S. 498, 515 (1911). As such, they fall within the limited exception recognized in *Sosna* v. *Iowa*, 419 U.S. 393 (1975) that a class action remains viable notwithstanding mootness of the representative claims prior to certification. *See also Gerstein* v. *Pugh*, 420 U.S. 103, 110, n.11 (1975).

Thus, the court finds that plaintiff has satisfied the requirements of Rule 23(a). This is not, however, the end of the inquiry. Defendant contends that class certification is neither necessary nor appropriate in this case under Rule 23(b)(2). The Secretary advances the argument that class certification will introduce an unnecessary complication to the litigation since whatever relief granted in this case would, under the principle of *stare decisis*, inure to the benefit of the purported class members. Defendant cites several cases in support of this proposition. However, upon examination of these decisions, it is apparent that they involve challenges to the constitutionality of statutes or regulations. In a situation where a statute is held to be unconstitutional as to the named plaintiff, its application would be impermissibly applied to everyone else, whether or not they are a party. Class certification would not be necessary.

The case now before the court is distinguishable. Plaintiffs have brought a mandamus action challenging not a statute, but the defendant's conduct in administering that statute and its regulations. Should the court decide that defendant's actions as to the named plaintiffs are unlawful, other social security claimants who had experienced some delays not identical to those experienced

by these two plaintiffs, would not necessarily benefit from that decision. Moreover, class certification is important to preserve this claim from the possible effect of mootness. *Dumas* v. *Cleveland*, Civ. No. 77-169 (D.Vt., July 21, 1978); *D.C.* v. *Surles*, Civ. No. 78-91 (D.Vt. Dec. 6, 1978). Accordingly, the requirements of Rule 23(b) are also met.

Finally, the defendant asks the court to redefine the class so as to limit it to "cessation" claimants and exclude "initial determination" claimants. As noted above, such a distinction is not made in the statutory or regulatory scheme of Title II of the Social Security Act. The court sees no reason to create such a distinction here.

Plaintiffs' motion for class certification is GRANTED.

Dated at Brattleboro, in the District of Vermont, this 14th day of June, 1979.

/s/ James S. Holden
JAMES S. HOLDEN
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Civil Action No. 78-266

LEON S. DAY and AMEDIE MAURAIS, on behalf of themselves and all others similarly situated, PLAINTIFFS

v.

PATRICIA ROBERTS HARRIS, Secretary, United States Department of Health, Education and Welfare, DEFENDANT

SECOND SUPPLEMENT TO DEFENDANT'S ANSWER TO PLAINTIFF'S INTERROGATORY 9

Defendant hereby supplements her answer to Interrogatory 9 by providing a case-by-case breakdown of reconsideration determinations of adverse straight Title II disability initial determinations for January and February 1979. These figures reflect processing times as described in defendant's supplemental answer served February 13, 1979.

CASES CLEARED FROM THE CASE CONTROL SYSTEM
IN 1/79

Date Received in DDA	Date Cleared from DDA
11/22/78	4/13/79
11/17/78	12/31/78
5/26/78	7/19/79
12/14/78	12/19/78
11/21/78	12/29/78
11/21/78	12/29/78
12/19/78	1/8/79
11/7/78	12/8/78
11/21/78	1/2/79
11/17/78	11/28/78
11/22/78	1/11/79
10/26/78	11/29/78
12/22/78	1/16/79
1/15/79	1/16/79
12/27/78	1/9/79
9/11/78	10/31/78
1/10/79	1/18/79
10/13/78	10/20/78
10/11/78	12/1/78
12/15/78	1/9/79
10/4/78	1/19/79
1/12/79	1/19/79
10/26/78	12/5/78
11/17/78	1/17/79
12/19/78	1/24/79
12/15/78	1/17/79
1/4/79	1/8/79
12/12/78	12/20/78
11/21/78	12/20/78

CASES CLEARED FROM THE CASE CONTROL SYSTEM
IN 2/79

Date Received in DDA	Date Cleared from DDA
11/17/78	1/19/79
10/18/78	10/20/78
9/19/78	1/25/79
11/14/78	1/17/79
1/17/79	1/30/79
11/14/78	1/23/79
11/21/78	12/29/78
11/17/78	11/28/78
12/30/78	1/16/79
11/21/78	11/28/78
1/12/79	1/24/79
12/4/78	12/27/78
1/26/68 [sic]	1/30/79
12/19/78	1/31/79
1/31/79	2/5/79
1/12/79	2/7/79
8/23/78	1/31/79
10/2/78	1/23/79
11/8/78	12/12/78
1/15/79	2/5/79
12/7/78	12/15/78
12/19/78	1/8/79
1/4/79	2/13/79
1/4/79	2/5/79
1/4/79	3/1/79
12/15/78	2/8/79
2/8/79	2/15/79
1/25/79	2/7/79
2/13/79	2/19/79

STATE OF MASSACHUSETTS)
) ss
COUNTY OF SUFFOLK)

I, Robert C. Green, being duly sworn, hereby depose and say that I am the Regional Commissioner, Boston Region, Social Security Administration, Department of Health, Education, and Welfare; that as such I am authorized to and do make this verification for and on behalf of the Secretary of Health, Education, and Welfare, acting by and through the Social Security Administration; further, that upon information furnished to me in good faith and on the basis of the best information available within SSA, the undersigned representative of the Secretary of the Department of Health, Education, and Welfare hereby declares that the aforesaid supplemental answers to Plaintiff's Interrogatories are true to the best of my knowledge, information, and belief.

ROBERT C. GREEN
Regional Commissioner, Boston Region
Social Security Administration
Department of Health, Education, and Welfare

Subscribed and sworn to before
me this — day of February 1979.

_____

Notary Public

My Commission expires: _____

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Civil Action No. 78-266

LEON S. DAY and AMEDIE MAURAIS, on behalf of themselves and all others similarly situated, PLAINTIFFS

v.

PATRICIA ROBERTS HARRIS, Secretary, United States Department of Health, Education and Welfare, DEFENDANT

DEFENDANT'S ANSWER TO PLAINTIFF'S SECOND INTERROGATORIES

Now comes the defendant, Secretary of the Department of Health, Education and Welfare, and hereby answers plaintiffs' Second Interrogatories, pursuant to Rule 33, Federal Rules of Civil Procedure.

For purposes of this Answer, the following definitions apply:

Initial denials: Those cases where an initial claim for disability benefits is denied.

Continuing disability investigations (CDIs): Those cases where the claimant has been receiving benefits, but upon periodic review of the disability status, a determination is made to terminate benefits.

Office of Disability Operations (ODO): This office carries on the functions of the former Bureau of Disability Insurance (BDI) centrally located in Baltimore, Maryland.

SECOND INTERROGATORY NO. 1:

For the period January 1, 1978 to the date of answer hereof, for each reconsideration of an adverse straight Title II disability initial determination, please give the date of the request for reconsideration and the date the reconsideration determination was issued. (NOTE: this

interrogatory is specifically intended to cover the period from the date the request for reconsideration is received by the relevant Social Security Administration District Office until the date the reconsideration determination is mailed to the claimant. It is expressly intended to include all periods and elements of processing including all cases sent to the Bureau of Disability Insurance for any reason).

ANSWER

To provide the information requested, defendant undertook a manual review of the records maintained by the Vermont Disability Determination Agency (DDA) for the period October 1, 1977[1] to January 31, 1980. These alphabetical records pertain to all disability claims made during that period (approximately 11,000) whether the claims were granted, denied, appealed, etc. Due to the differences in processing disability claims, defendant presents the results of this review by category:

I. *Initial Denials.* For the period October 1, 1977 to January 31, 1980, DDA processed 421 reconsiderations of initial denials (197 for FY 1978, 199 for FY 1979 and 25 for FY 1980). Attachment A contains the date each request for reconsideration (Form SSA-561) was received in the Social Security Administration District Office, the date the case was received in the DDA, the date the case was cleared by the DDA, and the processing time.[2] The average processing time for all of the 421 reconsiderations was 54.9 days (47.8 days for FY 1978, 60.9 days for FY 1979 and 62.7 days for FY 1980).

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[1] The records are kept in alphabetical order by fiscal year, which begins October 1. There is no strictly chronological or categorical record keeping system.

[2] The column marked "Other" in Attachment A contains miscellaneous notations made by the review team. Attachment A contains two additional columns, one showing the decision (affirmance or reversal) and the other showing where the claims folder was sent after DDA clearance.

Processing time was measured from the date the request for reconsideration was received at the District Office to the date the case was cleared by the DDA.

The DDA clearance date does not necessarily reflect "the date the reconsideration determination is mailed to the claimant" as requested. The letter notification which is mailed to the claimant is computer generated and no copy thereof is kept in the files searched. To determine the exact date of the mailing of notification, defendant would have to locate and review each of the 421 cases, a task considered to be overly burdensome in light of the alternative information here provided. With the possible exception of the limited types of cases noted below, the DDA clearance date shown in Attachment A would precede or follow the actual mailing date by only one or two days. Accordingly, the information provided in Attachment A is the best information available and closely approximates the mailing date sought by plaintiffs. Defendant objects to conducting a search for all 421 files to obtain this information.

The notice of determination would have been computer generated by the DDA and sent to the claimant within a day or two preceding or subsequent to DDA clearance in all but the following cases:

1. The notice of determination is manually prepared and released (either by the DDA or the SSA District Office) when it cannot be computer generated due to system limitations and in those Title II cases regarding childhood disability (CDB) and disabled widows/widowers (DWB) (cases not addressed in the instant litigation). In these cases, the notice of determination could be slightly delayed.

2. Cases excepted from the computer system requiring "special handling" are sent to ODO for preparation and release of special manual notices. Because of the minimal number of cases in this category,[3] defendant objects

[3] Attachment A reveals that 44 cases were sent to ODO. It cannot be determined whether these cases included any special handling

to providing this information as burdensome and not statistically relevant.

II. *Continuing Disability Investigations*

A different, and more time consuming, process applies to claimants who seek reconsideration of cessation of their benefits (CDIs). For the period October 1, 1977 to January 31, 1980, 32 cases in this category [4] were identified. All reconsiderations of cessation are subject to a preadjudicative review at ODO and decisional notices are not released until the review is complete. Review of the DDA records as described above, therefore, did not provide all the information requested by plaintiffs. Consequently, in order to obtain the processing times for these cases, it was necessary to locate and extract information from each of the claim folders. Defendant has obtained the requested information for 31 of the 32 cases. Defendant has been unsuccessful to date in an effort to locate the remaining claims folder, however, efforts are continuing.

Attachment B contains information similar to the information contained in Attachment A. It also includes case worksheets for each of the 31 cases, which show the date the request for reconsideration was received at the District Office, the date ODO prepared and released the notice of determination, and the processing time. Where available, individual case worksheets contain descriptions of factors which may have contributed to excessive proc-

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cases. Approximately ten percent of the reconsiderations of initial denials processed by the DDA, however, are sent to ODO for post-adjudicative sample review as a quality control measure. It is therefore presumed that most, if not all, of the 44 cases (approximately 10% of the 421 cases) were sent to ODO for sample review. This review does not delay the notice of decision, which, as previously explained, would have been sent to the claimant within one or two days prior or subsequent to DDA clearance.

[4] CDI's are approximately 8% of the total reconsideration cases.

essing times. The processing time (days elapsed) are shown below:

1. 24
2. 36
3. 47
4. 49
5. 52 *
6. 55
7. 58
8. 63
9. 70
10. 88
11. 93
12. 94
13. 96
14. 108
15. 111
16. 115
17. 122
18. 123
19. 131
20. 146
21. 154
22. 166 (Plaintiff Day)
23. 176
24. 191
25. 205
26. 213 (Plaintiff Maurais)
27. 217
28. 221 *
29. 323
30. 353 *
31. 395 *
32. No record

* Indicates notices not yet released.

STATE OF MASSACHUSETTS)
) ss
COUNTY OF SUFFOLK)

I, Robert C. Green, being duly sworn, hereby depose and say that I am the Regional Commissioner, Boston Region, Social Security Administration, Department of Health, Education, and Welfare; that as such I am authorized to and do make this verification for and on behalf of the Secretary of Health, Education, and Welfare, acting by and through the Social Security Administration; further, that upon information furnished to me in good faith and on the basis of the best information available within SSA, the undersigned representative of the Secretary of the Department of Health, Education, and Welfare hereby declares that the aforesaid answer to Plaintiffs' Second Interrogatories are true to the best of my knowledge, information, and belief.

/s/ Robert C. Green
ROBERT C. GREEN
Regional Commissioner Boston Region
Social Security Administration
Department of Health, Education, and Welfare

Subscribed and sworn to before
me this 15th day of February 1980.

/s/ [Illegible]
Notary Public

My Commission expires: Aug. 1, 1980

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Civil Action File No. 78-266

LEON S. DAY and AMEDIE MAURAIS, on behalf of themselves and all others similarly situated, PLAINTIFFS

v.

PATRICIA ROBERTS HARRIS, Secretary, United States Department of Health, Education and Welfare, DEFENDANT

MEMORANDUM OF DECISION

In this proceeding, designated and later certified as a class action, plaintiffs challenge the procedures used to determine whether a recipient of Social Security Disability benefits under Title II of the Social Security Act 42 U.S.C. § 401 *et seq.* (hereinafter the Act) has a continuing disability and is therefore entitled to further receipt of benefits. In their pleadings, plaintiffs seek declaratory and injunctive relief with respect to delays recipients encounter in each of two phases of the review procedures: the delay between the initial finding that the recipient is no longer disabled and the Agency's reconsideration of the finding; the delay between the request for an administrative hearing to review the adverse finding and the time the hearing is scheduled.

In an opinion and order dated December 28, 1979, the court granted partial summary judgment to the plaintiffs and held that the delays in scheduling the administrative hearings violated the Act's statutory directives to hold the hearings within a reasonable time. Applying the rule of *Barnett* v. *Califano*, 580 F.2d 28 (2d Cir. 1978), the court required the administrative hearings to be held within 90 days from the time they were requested. In its December order, the court also denied plaintiffs' motion for summary judgment on the issue of the delay in the reconsideration proceedings. The statistical data in-

cluded in the record were insufficient to support a contrary ruling inasmuch as they centered upon the State Agency's performance at the reconsideration phase and "did not reflect the length of delays incurred by the applicants themselves."

The Secretary subsequently provided the plaintiffs with additional factual data regarding the reconsideration proceedings. The parties have filed cross motions for partial summary judgment. The issue central to both petitions is whether reconsideration proceeding delays which exceed 30 days are unreasonable.

In their complaint the plaintiffs requested this court to direct the Secretary to limit the delays in the reconsideration proceedings to a maximum of 30 days. At the hearing on the motion, however, plaintiffs elaborated on the nature of the relief sought. At that time plaintiffs argued that the 30 day limit, although binding on the Secretary, should be flexible with respect to the recipients. Plaintiffs urge that the time constraint should be subject to voluntary waiver by recipients who request that the Secretary review additional medical evidence. Waiver would also result when the recipient failed to provide requested information or to appear as required.

Plaintiffs assert that the factual data available to the court at this time is sufficient to justify a ruling on their motion. According to the record, 31 cases during the period from October 1, 1977 through January 31, 1980, involved termination of benefits. Based on a processing time commencing with the date the reconsideration request was received by the Agency through the date the determination was made, one case was processed in less than 30 days; 6 were fully processed in less than 60; over half of the cases took over 120 days and 3 were incomplete after 221, 353, and 395 days respectively. The plaintiffs argue that this data is sufficient for the court to extend the *Barnett* rule to the reconsideration phase of the proceedings and to declare that any delay exceeding 30 days is unreasonable.

The Secretary, on the other hand, maintains that a mandatory 30 day time limit is patently unreasonable since the reconsideration review is a *de novo* review and the appeals process is an "open file" system which permits the claimant to submit additional evidence of his disability on a continuing basis. The defendant also argues that current processing times are reasonable in that the reconsideration process involves a thorough examination of all the evidence on the record and, frequently, the development of new medical evidence. Defendant's final assertion is that there is no statutory basis for the time limitations sought by plaintiffs and that judicial imposition of time constraints may later prove to be inconsistent with proposed legislation.

The law is well settled that on a motion for summary judgment under Fed.R.Civ.P. 56, the moving party must demonstrate that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. *Robertson* v. *Seidman & Seidman*, 609 F.2d 583 (2d Cir. 1979). C. Wright & A. Miller, *Federal Practice and Procedure* § 2725. When parties may draw conflicting inferences from factual data available in the record, granting summary judgment is inappropriate. *Id.* Inasmuch as the factual data in the record before the court is inconclusive with respect to the reasonableness of the delays in the reconsideration proceedings, the court will deny both parties' motions for summary judgment.

It should be noted at the outset that this is not a proper case for the extension of the *Barnett* rule. There the court required the Secretary to follow the statutory mandate in 42 U.S.C. § 405(b) to provide an administrative hearing within a reasonable time. Here, the only reference to the reconsideration process is contained in the regulations of the Act and they do not impose time constraints on the Secretary.[1]

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[1] The pertinent parts of the regulations contain the following:

§ 404.914 *Reconsidered determination.*

The Administration shall, when a request for reconsideration has been filed, as provided in §§ 404.910 and

At the heart of the court's refusal to grant either motion for summary judgment, however, is the inconclusiveness of the data before it. It is impossible to determine from the record whether the Secretary's procedures are reasonable or unreasonable. The mere length of processing times does not constitute an adequate basis for the extraordinary relief sought by the named plaintiff and the class he seeks to represent. Although the record does contain a sampling of 31 reconsideration cases and the time it took to process them, it is devoid of information concerning the reasons why the delays occurred. The plaintiffs have recognized that there will be times when the delay is either requested by the recipients to enable them to provide additional information or is caused by the recipients' failure to cooperate with the Secretary's requests. Similarly, the Secretary has acknowledged that delays may have been the result of increased case-load or

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404.911, reconsider the initial determination in question and the findings upon which it was based; and upon the basis of the evidence considered in connection with the initial determination and whatever other evidence is submitted by the parties or is otherwise obtained, the Administration shall make a reconsidered determination affirming or revising, in whole or in part, the findings and determination in question.

§ 404.915 *Notice of reconsidered determination.*

Written notice of the reconsidered determination shall be mailed to the parties at their last known addresses. The reconsidered determination shall state the specific reasons therefor and inform the parties of their right to a hearing (see § 404.917), or, if appropriate, the requirements for use of the expedited appeals process (see § 404.916a).

§ 404.916 *Effect of a reconsidered determination.*

The reconsidered determination shall be final and binding upon all parties to the reconsideration unless a hearing is requested in accordance with § 404.918 and a decision rendered or unless such determination is revised in accordance with § 404.956, or unless the expedited appeals process is used in accordance with § 404.916a.

insufficient staffing. It is clear, then, that the record is inconclusive with respect to the reasonableness of the delays. And since the reasonableness of the delays is the prime question before the court, the motions for summary judgment must be denied.

It is so ORDERED.

Dated at Rutland, in the District of Vermont, this 14th day of July, 1980.

/s/ James S. Holden
JAMES S. HOLDEN
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Civil Action File No. 78-266

LEON S. DAY and AMEDIE MAURAIS, on behalf of themselves and all others similarly situated

v.

PATRICIA ROBERTS HARRIS, Secretary, United States Department of Health, Education and Welfare

MEMORANDUM OF DECISION

In this certified class action, plaintiffs challenge the procedures used to determine whether a recipient of Social Security Disability benefits under Title II of the Social Security Act 42 U.S.C. § 401 *et seq.* (hereinafter the Act) has a continuing disability and is therefore entitled to further receipt of benefits. In their pleadings, plaintiffs seek declaratory and injunctive relief with respect to delays recipients encounter in each of two phases of the review procedures: the delay between the initial finding that the recipient is no longer disabled and the Agency's reconsideration of the finding; the delay between the request for an administrative hearing to review the adverse finding and the time the hearing is scheduled.

In an opinion and order dated December 28, 1979, the court granted partial summary judgment to the plaintiffs and held that the delays in scheduling the administrative hearings violated the Act's statutory directives to hold the hearings within a reasonable time. Applying the rule of *Barnett* v. *Califano*, 580 F.2d 28 (2d Cir. 1978), the court required the administrative hearings to be held within 90 days from the time they were requested. In its December order, the court also denied plaintiffs' motion for summary judgment on the issue of delay in the re-

consideration proceedings. The statistical data in the record were insufficient to support a contrary ruling.

The Secretary subsequently provided the plaintiffs with additional factual data and the parties filed cross motions for partial summary judgment. The issue central to both petitions was whether reconsideration proceeding delays which exceed 30 days are unreasonable. Both motions were denied, again because of the insufficiency of the factual data before the court.

After additional attempts at discovery proved to be unsuccessful, plaintiffs filed the following motions: 1) motion for summary judgment on the issue of reconsideration delay or 2) in the alternative to the motion for summary judgment a) a motion to compel discovery and b) a motion to direct entry of final judgment.

At a hearing before the court on November 18, 1980, the parties agreed as to the scope, content, and deadlines for additional discovery on the issue remaining in the case. It is the court's understanding that discovery is proceeding to the satisfaction of both parties. Since discovery is still in progress, the court will deny plaintiffs' motion for further summary judgment on the issue of reconsideration delays. Fed. R. Civ. Proc. 56 compels this result since factual disputes remain unresolved. In addition, the parties' agreement as to further discovery has disposed of the motion to compel.

The court is now called upon to determine the plaintiffs' motion to direct entry of final judgment for that portion of the court's opinion concerning the delays between the time an administrative hearing is requested and the time the hearing is scheduled. Plaintiffs are concerned that members of the class continue to be harmed by unreasonably delayed hearings while the remaining aspects of the litigation continue. As authority for their request, plaintiffs rely on Fed. R. Civ. P. 54 (b) and 56 (d). In the alternative, plaintiffs propose that the court preliminarily enjoin the defendants from scheduling disability hearings before an administrative law judge more

than 90 days from the date of a timely request. The Secretary opposes the motion because she states that regulations may be forthcoming which will conflict with such an order.

In this circuit, the standard for preliminary injunctive relief has recently been reiterated in *Jackson Dairy, Inc.* v. *H. P. Hood & Sons*, 596 F.2d 70 (2d Cir. 1979). In order to prevail on a motion for injunctive relief, the movant must demonstrate "(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Id.* at 72. The required harm is the type of irreparable injury for which a monetary award cannot provide adequate compensation. *Id.*

Since the plaintiffs have prevailed on the merits on this issue, the sole question for consideration here is whether they will suffer irreparable harm if an injunction does not issue. In *White* v. *Mathews*, 559 F.2d 852 (2d Cir. 1977), the court recognized that with respect to claimants whose benefits are ultimately reinstated following an administrative hearing, unreasonable delays in the scheduling of the administrative hearings unjustifiably deprive them of benefits which are lawfully theirs. *Id.* at 859.

In Vermont, almost half of the claimants who requested hearings after January 1978 waited more than 90 days for the hearings to be scheduled, with the range of delays varying from two to nine months. Those who benefits were erroneously terminated were thus unjustifiably deprived of awards that were lawfully theirs. Inasmuch as the claimants are persons who are unable to work and whose subsistence depends on these payments, the deprivation of benefits works hardships which cannot adequately be compensated by retroactive payments following a delayed decision in their favor.

The court will therefore preliminarily enjoin the defendant from scheduling administrative hearings more than 90 days after a timely request for such a hearing is made. The designated time period will not apply when 1) the claimant or his representative causes a delay by failing to provide information needed for adjudication; 2) the claimant or his representative requests a delay; 3) the claimant or his representative fails to appear for the scheduled hearing; 4) the delay is in some other way attributable to the claimant or his representative. The injunction will extend from the date of this order to the time this case comes to final resolution on the issue of the delay in the reconsideration proceedings.

It is so ORDERED.

Dated at Rutland, in the District of Vermont, on this 30th day of December, 1980.

/s/ James S. Holden
JAMES S. HOLDEN
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Civil No. 78-266

LEON S. DAY AND AMEDIE MAURAIS, on behalf of themselves and all others similarly situated, PLAINTIFFS

v.

RICHARD S. SCHWEIKER, Secretary of Health and Human Services, DEFENDANT

DEFENDANT'S ANSWERS TO PLAINTIFFS' THIRD SET OF INTERROGATORIES

Pursuant to the Court's direction at the November 18, 1980 hearing on plaintiffs' motion to compel discovery, and the subsequent agreements made by counsel regarding the scope, content and deadlines for discovery, defendant by counsel submits for filing his Answers to Plaintiffs' Third Interrogatories. In light of the fact that defendant's answers consist of 77 individual randomly selected case summaries, defendant submits the case summaries themselves in lieu of individual responses to each of plaintiffs' enumerated interrogatories. The case summaries were provided to plaintiffs in two installments on January 14 and January 22, 1981.

STATE OF MARYLAND :

ss

COURT OF BALTIMORE:

I, Harris Factor, being duly sworn according to law, depose and say that I am Deputy Director of the Office of Regulations, Social Security Administration, Department of Health and Human Services. The Office of Regulations is responsible for coordination of litigation activities on behalf of the Commissioner of Social Security. The foregoing response to Plaintiff's Third Set of Interrogatories,

together with the attached 77 individual case summaries, were prepared by employees of several components of the Social Security Administration and are true and correct to the best of my information and belief.

/s/ Harris Factor
HARRIS FACTOR

Sworn and Subscribed before me
This 30th day of March, 1981

/s/ Dianne J. Cheverie
DIANNE J. CHEVERIE
Notary Public

My Commission expires 7/1/82.

KEY TO LETTER CODES

A. Claimant requests delay

B. New medical evidence or impairments indicated by clt on filing recon (see block on 561)

C. Claimant requests new medical exams on filing recon

D. DDS (or DO) decides *itself* to obtain new medical evidence

E. Case where face-to-face interview during recon recon process

F. Case where telephone interview or conduct during recon porcess

G. Case where no new medical evidence is obtained and claimant does not cause a delay in processing recons.

H. File was lost or misplaced during recon processing.

I. Case where special handling by ODO due to CAPS exceptions.

J. Case where DO inputs determination into systems due to systems limitations

K. Case where PSC or other source (not ODO, DO or DDS) inputs deterfination [sic] into system

L. Claimant caused delay

CASE 1 — B, F, G, J

1.	12/5/78	Request for recon form (561) signed by claimant
2.	12/7/78	D/O received recon request
3.	12/7/78	D/O forwarded folder to DOS
4.	12/11/78	DOS received folder
5.	12/11/78	DDS examiner phoned claimant regarding Med. sources on SSA-561-none current
6.	12/14/78	DDS examiner signed determination (831)
7.	12/14/78	DDS physician signed 831
8.	12/19/78	DDS input recon denial and set folder to D/O
9.	12/27/78	D/O reinput and date run
10.	1/1/79	Date of recon denial notice

CASE 2 — G

1.	9/20/79	Request for recon filed
2.	9/26/79	DDS recd folder
3.	9/26/79	Determination signed by DDS examiner
4.	9/27/79	Determination signed by DDS physician
5.	9/27/79	Systems input of denial
6.	10/1/79	Run date
7.	10/6/79	Notice of denial released to claimant

CASE 3 — D, Q

1.	5/3/79	Request for recon received
2.	5/10/79	Request for recon released to DDS
3.	5/22/79	VAH additional Med. evid. received, "as requested"
4.	5/28/79	RFC determined by DDS physician (claim selected for Q.A. review)
5.	7/18/79	Vocational analysis prepared by DDS examiner
6.	7/18/79	Determination of denial signed by DDS examiner and physician (VR referral)
7.	8/15/79	Systems input

8.	8/15/79	Run date
9.	8/15/79	Notice of denial to claimant

CASE 4 B, D, Q

1.	1/31/78	Claimant filed for recon
2.	2/1/78	D/O forwarder folder to DDS
3.	2/2/78	DDS recd file
*	2/3/78	DDS requested and sent out for Med. evidence from Dr. Gould
4.	2/10/78	DDS recd medical evidence from Dr. Nathaniel Gould
5.	2/10/78	DDS examiner signed determination (831)
6.	2/16/78	DDS physician signed 831
7.	2/17/78	DDS forwarded file to DDO
8.	2/23/78	ODO recd folder
9.	3/1/78	Internal ODO SSA-559 for preparation of denial notice
10.	3/9/78	ODO Med. Staff completed Quality assurance evaluation form SSA-3094
11.	3/14/78	ODO examiner completed SSA-3094 and sent folder to typing for recon notice
12.	3/16/78	Date of recon denial notice

CASE 5 D, F

1.	7/20/79	Claimant filed recon
2.	7/20/79	D/O forwarded folder to DDS
3.	7/23/79	DDS Recd folder
4.	7/23/79	DDS req. Med. report from Dr. Kuhlmann
5.	7/24/79	7/23/79 req. completed and sent
6.	8/2/79	DDs recd report dated 7/31/79 from Dr. R. F. Kuhlmann
7.	8/3/79	DDS req. another report from Dr. Kuhlmann
8.	8/6/79	8/3/79 req. completed and sent
9.	8/30/79	Two phone calls for follow-up on 8/6/79 Med. request

10.	9/5/79	DDS recd report date 5/11/79 from Dr. Kuhlmann
11.	9/6/79	DDS examiner signed determination (831)
12.	9/7/79	DDS physician signed 831
13.	9/13/79	DDS input for denial notice
14.	9/19/79	Date of denial notice for recon

CASE 6 D, F

1.	2/9/79	D/O recd ltr of 2/8/79 from legal rep. regarding 2/2/79 phone call that initial denial notice notrecd
2.	2/27/79	Letter from leg. rep. regarding filing for recon
3.	2/28/79	Claimant filed recon request
4.	3/5/79	D/O report of contact that good cause shown for late filing
5.	3/14/79	Appointment of representative form signed by claimant and rep.
6.	3/26/79	Reconsideration disability report and updated authorization to release forms signed by claimant
7.	3/27/79	D/O report of contact regarding claimants phone #
8.	3/27/79	D/O forwarded folder to DDS
9.	3/28/79	DDS recd folder
•	3/28/79	DDS req. and sent ltr to obtain Med. evidence from Dr. Zelazo
10.	3/28/79	DDS letter to claimant's legal rep. regarding submitting additional medical evidence
11.	4/12/79	DDS recd report dated 4/10/79 from Robert M. Zelazo, M.D.
12.	4/18/79	DDS examiner signed physician countersigned determination
13.	4/26/79	DDS input allowance
14.	4/26/79	Date run for payment of allowance

CASE 7 B, D

1.	8/3/79	Request for recon filed by claimant
2.	8/7/79	DO forwarded folder to DDS
3.	8/9/79	DDS recd folder
*	8/10/79	DDS req. and sent out req. for Med. evidence from Dr. Terrian
4.	8/20/79	DDS recd Med. report from C. M. Terrian, Sr. M. D.
5.	8/27/79	DDS examiner signed determination (831)
6.	8/27/79	DDS physician signed 831
7.	9/12/79	DDS released recon denial notice and forwarded to D/O.

CASE 8 D, J, Q

1.	11/16/78	Request for recon filed by claimant
2.	11/17/78	D/O forwarded folder to DDS
3.	11/21/78	DDS recd folder
*	11/24/78	DDS Requested Med. evidence from Dr. Thomas W. Martinini
*	11/27/78	Action taken on Medical request
4.	12/4/78	DDS recd 11/29/78 report from Thomas W. Martini, M. D.
5.	12/5/78	DDS examiner signed determination (831)
6.	12/11/78	DDS physician signed 831 DDS Q A
7.	12/27/78	Report of DDS contact that claimant had completed evaluation in 1974 and 1975
8.	1/2/79	DDS input allowance
9.	1/8/79	D/O input
10.	1/10/79	Run date-allowance paid Q A involved

CASE 9 G, Q

1.	9/7/77	Request for recon
2.	9/16/77	Case control inquiry—DO

3.	9/21/77	Request for folder from BDI-DO
4.		Folder received in DO
5.	10/6/77	Forwarded to DDS
6.	10/13/77	Received in DDS
7.	10/17/77	Determination signed-affirmation
8.	10/21/77	Notice to clt released
9.	10/21/77	File returned to DO.

CASE 10 B, Q
(Coquality review

1.	5/10/79	Request for recon filed
2.	5/15/79	ODO QA review by examiner
3.	6/6/79	DDS received folder
4.	6/8/79	Ltr. to doctor for Med. evidence and RFC
5.	6/28/79	RFC report from treating physician received
6.	6/29/79	Med. evaluation and RFC by DDS physician
7.	7/2/79	Referred to VR and photocopy of material
8.	7/2/79	Determination signed by DDS exmainer and physician
9.	7/9/79	Systems input by DDS
10.	7/9/79	Run date
11.	7/14/79	Notice of denial released to claimant

CASE 11 G, F

1.	2/21/79	Recon request filed by claimant
2.	2/22/79	D/O forwarded folder to DDS
3.	2/23/79	DDS read filed
4.	2/26/79	DDS ltr requesting medical evidence from Thomas W. Martenis
5.	3/7/79	DDS read medical evidence from Dr. Martenis
6.	3/12/79	DDS reviwed [sic] filed for severity
7.	3/14/79	DDS unsuccessful phone call to Dr. Martenis
8.	3/16/79	DDS second unsuccessful call to Dr. Martenis

9.	3/19/79	DDS third phone call—Dr. Martenis will send x-ray of hand
10.	3/21/79	DDS read x-ray of hand from Dr. Martenis
11.	3/21/79	DDS examiner signed determination (831)
12.	3/26/79	DDS physician signed 831
13.	4/2/79	DDS input allowance
14.	4/3/79	DDS returned folder to D/O
15.	4/4/79	Run date for payment of allowance

CASE 12 Q

1.	2/2/79	D/O telephone interview with claimant
2.	2/7/79	Claimant signed recon request (561)
3.	2/13/79	Recon request (561) read by D/O
4.	2/13/79	D/O forwarded folder to DDS
5.	2/14/79	DDS recd folder
6.	3/22/79	DDS examiner signed recon determination (831)
7.	3/26/79	DDS physician signed recon determination (831)
		QA-DDS
8.	3/28/79	DDS denial input—date run
9.	3/28/79	DDS forwarded to D/O
10.	4/2/79	Recon denial notice
		Neither File nor work sheet reflect reason for delay

CASE 13 B

1.	5/11/79	Request for recon filed (Denied at initial for *SGA*)
2.	10/16/79	Claimant reports no longer working (beginning 9/18/79)
3.	10/26/79	Report from employer received
4.	10/26/79	Report from employer received
5.	10/31/79	File released to DDS by D/O Rep.
6.	11/2/79	Med. evid. requested from treating sources

7.	11/21/79	Med. evid. received
8.	11/26/79	DDS examiner and physician signed determination of allowance
9.	11/28/79	Systems input
10.	12/19/79	Systems reject—run date
11.	1/22/80	ODO input allowance due to systems rejection (Future month of entitlement)

CASE 14 D

1.	8/23/75	Recon form (561) signed by claimant
1.5	8/29/75	Request to VA for updated medical info.
	8/29/75	Ltr sent by DDS
2.	9/19/75	Recon request recd in D/O from claimant's attorney
3.	10/20/15	Ltr to claimant's attorney that delay was due to non-recd of folder from BDD (ODO)
4.	11/17/75	D/O forwarded folder to DDS
5.	11/19/75	DDS recd folder
6.	11/28/75	DDS recd Med. report from VA White River Junction, VT
7.	11/28/75	DDS examiner sent ltr tt C/E Peter D. Upton, M. D. for C/E on 1/5/76
8.	1/5/76	C/E done
9.	1/8/76	C/E report recd by DDS
10.	1/15/76	DDS examiner signed determination (831)
11.	1/15/76	DDS physician signed 831
12.	1/16/76	DDS suit file to D/O
13.	1/23/76	DO report that payment being made pending W/C development
14.	2/21/76	ODO authorizer approved award (SSA-101) no subsequent recon involved on disability issue

CASE 15 G

1.	1/10/79	Claimant filed for Recon; also, Recon. Disability Rep't (SSA 3441) taken

2.	1/15/79	DO forwarded claim to DDS
3.	1/16/79	DDS rec'd claim folder
4.	1/25/79	Examiner signed determination (SSA-831)
5.	1/26/79	DDS MD countersigned
6.	1/31/79	DDS made systems input—Denial
7.	2/10/79	Ltr of denial to claimant

CASE 16 F, Q, B, D

1.	1/26/79	Request for Recon filed
2.	1/26/79	D/O rep released request to DDS
3.	1/30/79	Forms and cover letter sent to claimant by DDS examiner
4.	1/30/79	Hospital report requested by DDS examiner
5.	1/30/79	Follow-up phone contact with treating source DDS examiner
6.	1/30 79	Requested copies of office records from another treating source, by mail DDS examiner
7.	2/2/79	Additional evidence request letter released by DDS examiner
8.	2/5/79	Additional Med. evidence received by DDS
9.	2/14/79	Phone contact with treating physician —Follow-up by DDS examiner
10.	2/16/79	Phone contact with treating source by DDS examiner
11.	2/27/79	DDS examiner sent file to DDS physician for Med. opinion (QA involved)
12.	3/30/79	Consultative exam requested by DDS examiner
13.	4/4/79	Consultative exam performed
14.	4/11/79	Consultative exam report received by DDS
15.	4/12/79	Phone contact with consulting physician by DDS examiner

16. 4/17/79 RFC assessment by DDS claims specialist
17. 4/18/79 Determination signed by DDS examiner and physician
18. 4/18/79 Systems imput by DDS
19. 4/27/79 Notice of denial released

CASE 17 B

1. 11/1/79 Recon requested
2. 11/13/79 D/O released request to DDS
3. 11/21/19 Request sent to treating source for additional evidence, by DDS examiner
4. 11/29/79 Request sent to other treating sources for updated Med. evidence, by DDS examiner
5. 12/4/79 Additional evidence received from treating physician
6. 15/5/79 Additional evidence received from treating physician
7. 12/21/79 DDS physician signed residual functional capacity worksheet
8. 1/9/80 DDS examiner and physician signed determination
9. 1/11/80 Systems input
10 1/16/80 Run date of allowance

CASE 18 G, J, R

1. 2/16/79 Claimant filed request for recon
2. 2/16/79 DO forwarded folder to DDS
3. 2/20/79 DDS recd folder
4. 2/21/79 DDS examiner signed determination (831)
5. 2/21/79 DDS physician signed 831 DDS-QA
6. 2/23/19 DDS input
7. 2/27/79 Date run (DO re-input)
9. 3/7/79 Date of recon denial notice

CASE 19 B, Q

1.	10/16/79	Claimant filed recon and submitted Med. evidence
2.	10/17/79	D/O forwarded folder to DDS
3.	10/19/79	DDS recd folder
4.	10/22/79	DDS worksheet shows case ready for decision
5.	10/22/79	DDS recd D/O's 10/23/79 reply to congressional inquiry
6.	10/24/79	DDS recd D/O's 10/23/79 reply to congressional with duplicate med. evidence submitted at recon
7.	10/24/79	DDS physician report of contact with severity assessment
8.	10/30/79	DDS examiner signed determination (831)
9.	10/ /79	DDS physician signed 831 with day of month blank DDS-QA
10.	11/13/79	DDS input of allowance
11.	11/14/79	Date run for allowance payment
12.	11/15/79	DDS returned filed to D/O

CASE 20 D, Q, F

1.	7/7/79	Claimant signed recon from (SSA-561)
2.	7/9/79	D/O recd recon request
3.	7/23/79	D/O forwarded folder to DDS
4.	7/24/79	DDS recd recon
5.	7/24/79	DDS rev. file
6.	8/1/79	C/E request on work sheet from DDS
7.	8/2/79	DDS examines authorized a C/E from Brattleboro Memorial Hosp. for 8/15/79
8.	8/27/79	Out for Dr. signature follow-up on C/E
9.	8/28/79	DDS recd C/E report
10.	8/28/79	Reviewed C/E—does not meet or equal listings
11.	9/4/79	DDS examiner signed determination (831)

12.	9/6/79	DDS physician completed medical evaluation for residual functional capacity
13.	9/7/79	DDS physician signed 831 DDS QA
14.	9/14/79	DDS input for denial notice
15.	9/17/79	DDS returned folder to D/O There is no documentation as to date of the recon denial notice

CASE 21 G, Q

1.	9/17/79	Claimant signed recon form (SSA-561)
2.	9/21/79	Recon form received by D/O
3.	10/16/79	D/O forwarded folder to DDS
4.	10/19/79	DDS received folder
5.	10/24/79	DDS examiner signed determination (831)
6.	10/25/79	DDS physician signed 831 DDS QA
7.	11/1/79	Date of DDS recon denial notice

CASE 22 B, F, Q

1.	3/8/79	Claimant requested recon by letter
2.	4/11/79	Recon form (561) signed by claimant
3.	4/12/79	Recon received in D/O
4.	4/12/79	D/O forwarded folder to DDS
5.	4/16/79	DDS received folder—attempt call Dr. Edwards and Fabricius
6.	4/16/79	DDS received and sent for medical evidence from Dr. Edwards and Fabricius
7.	4/19/79	DDS received medical report from Keith R. Edwards, MD
8.	4/23/79	States to Dr. Peltz
9.	5/9/79	Dr. Peltz has info. and will send
10.	5/14/79	DDS received medical report from William Peltz, MD
11.	6/14/79	2 calls to orthopedic associates
12.	6/19/79	Call to orthopedic associates
13.	7/13/79	DDS received C/E report from Richard Fabricius, MD

14. 7/25/79 gave folder to DDS doctor for residual functional capacity assessment
15. 8/1/79 RFC completed
16. 8/21/79 DDS examiner signed determination (831)
17. 8/22/79 DDS physician signed 831 DDS-A
18. 8/24/79 DDS released recon denial notice
19. 8/24/79 DDS forwarded folder to D/O

CASE 23 B, F, F, D

1. 3/22/78 Recon request
2. 3/22/78 Sent to DDS
* 3/27/78 Req'd typist to type letter, DDS
3/28/78 received case
3. 3/30/78 Letter to attorney questioning medical reports; letter to VAH
4. 3/30/78 Telephone to claimant's home, wife said in hosp.; also, letter to Hosp. for rept.
5. 4/7/78 Letter from attorney with medical records
6. 4/10/78 Contact with MD office by DDS
7. 4/14/78 Letter from attorney with medical records
8. 5/10/78 Telephone to claimant for discussion of work activity
9. 5/24/78 Determination signed by exam; affirm
10. 5/24/78 notice sent by DDS to claimant and atty.

CASE 24 B, G

1.	12/5/79	Recon. filed; SSA3441 (Recon Disability Rept.
2.	12/10/79	File to DDS
3.	12/17/79	File received in DDS
4.	12/18/79	Examiner signed determination
5.	12/19/79	DDS MD countersigned determination
6.	12/20/79	DDS systems impact—Denial; File to D/O
7.	1/4/80	D/O systems impact; Systems Room—Denial

CASE 25 B, D, Q

1.	5/15/79	Request for recon filed by claimant
2.	5/23/79	D/O released file to DDS
3.	5/28/79	Additional Med. evidence requested from treating source with DDS examiner
4.	6/14/79	Additional Med. evidence received
5.	6/22/79	Consultative exam scheduled
6.	7/2/79	Consultative exam performed
7.	7/11/79	Consultative exam report received by DDS
8.	7/13/79	Determination signed by DDS examiner and physician
9.	7/16/79	Systems input
10.	7/17/79	Run date
11.	7/22/79	Notice of denial sent to claimant QA involved

CASE 26 B, D, J

1.	9/16/79	Request for recon file by claimant
2.	9/18/79	D/O released request to DDS
3.	9/19/79	File received in DDS
4.	9/27/79	Additional evidence requested from treating source by DDS examiner

5.	10/5/79	Additional evidence requested from treating source by DDS examiner
6.	10/10/79	Additional Med. evidence received in DDS
7.	10/17/79	Determination signed by DDS examiner
8.	10/19/79	Determination signed by DDS physician
9.	10/24/79	Systems input
10.	1/3/80	Manual release of Notice of denial, by D/O Rep.

CASE 27 B, D, F, Q

1.	4/13/79	Request for Recon filed
2.	4/13/79	DO released request to DDS
3.	4/16/79	Additional evidence requested from treating source by DDS examiner
4.	4/23/79	Additional Med. evidence received
5.	5/23/79	DDS examiner notified D/O status of claim
6.	6/14/79	DDS examiner notified D/O restatus of claim
7.	6/15/79	Consultative exam scheduled by DDS examiner
8.	6/18/79	Claimant reminded re CE by phone by DDS examiner
9.	6/18/79	Consultative performed
10.	6/27/79	Consultative report received in DDS
11.	7/3/79	Phone contact with consulting M.D.
12.	7/3/79	Determination signed by DDS examiner
13.	7/5/79	Determination signed by DDS physician
14.	7/6/79	Systems input
15.	7/11/79	Run date for allowance

CASE 28 D

1.	1/24/79	Request for recon
2.	1/26/79	Prior claim requested by D/O Rep.
3.	2/8/79	Request and file released to DDS by D/O Rep.

4.	2/28/79	Consultative exam performed
5.	3/5/79	Consultative exam report received by DDS examiner
6.	3/13/79	DDS examiner and physician signed determination
7.	3/20/79	Notice to claimant released to claimant

CASE 29 B, D, J

1.	11/30/77	Request for recon signed by claimant
2.	12/5/77	Request for recon filed (date stamped by D/O)
3.	12/5/77	DO forwarded folder to DDS
4.	12/6/77	DDS Rec'd folder
*	12/7/77	DDS req. and sent ltr for Med. evidence from Med. Center Hosp.
5.	12/12/77	DDS rec'd Medical report from Medical Center Hosp. of Vermont
*	12/28/77	DDS req. and sent for more recent evidence from Med. Center Hosp.
*	1/3/78	Recd Med. evidence from Med. Center Hosp.
6.	1/11/78	DDS examiner signed determination (831)
7.	1/12/78	DDS physician countersigned 831
8.	1/13/78	DDS released folder to D/O
9.	2/7/78	Run date for notice
10.	2/12/78	Date of Recon denial notice file reflects notice heldup because D/O did not handle CAPS properly

CASE 30 G, Q

1.	3/21/79	Rquest for recon filed
2.	4/12/79	Devel. req. went to DDS with folder on 4/12/79 (from BDI QA) with a recommendation to allow

3.	4/16/79	DO made telephone contact to BDF (Co) for folder which was not available due to QA activity, deficiency cited on initial denial. Note: As shown above the folder had been sent to the DDS for additional consideration
*	4/30 79	Sent form SSA 3369 to claimant (Vocational)
4.	5/4/79	Vocational Report Rec'd on 5/4/79
5.	5/7/79	Vocational report rec'd in DDS
*	4/23/79	Recon req. rec'd in DDS on 4/23/79
6.	5/8/79	Residual functional capacity rec'd. DDS selected case for QA review
7.	5/14/79	Allowed and signed by examiner and doctor. Allowed *not* as result of recon., but as a result of QA return
8.	5/23/79	Determination input by DDS
9.	5/29/79	Computer run—*in pay*

CASE 31 D, E, Q

1.	9/24/79	Request for recon filed by claimant
2.	9/25/79	DO ships folder to DDS
3.	10/1/79	Case rec'd in DDS; ltr to Dr and hospital for present time
4.	10/10/79	DDS examiner receives medical report from treating physician which was requested
5.	10/18/79	DDS physician authorizes C. E. out of state
6.	10/25/79	Claimant notified of exam on 11/2/79 by DDS examiner
7.	11/2/79	CDE scheduled with consulting physician
8.	11/14/79	Report of consulting physician received by DDS examiner
9.	11/15/79	DDS physician completes RFC evaluation
10.	11/19/79	DDS V.E. completes vocational assessment
11.	11/19/79	DDS examiner determine claim established

12.	11/20/79	DDS physician countersigns allowance case selected by DDS for QA
13.	12/3/79	DDS examiner releases folder to DO
14.	12/4/79	DO processes allowance

CASE 32 — B, Q, Congressional

1.	11/23/77	Request filed for reconsideration
2.	11/30/77	Appointment of representative (attorney)
3.	12/1/77	BDI QA review on initial determination
4.	12/7/77	Response to Congressional inquiry released by ODO
5.	undated	Case returned to DO
6.	12/28/77	Case released to DDS
7.	12/29/77	Claim received in DDS
8.	12/30/77	Determination signed by examiner
9.	1/3/78	Determination countersigned by DDS M.D.
10.	1/4/78	Notice released by DDS to claimant and attorney; case to DO

CASE 33 — I, F, G, L

1.	7/2/79	Recon filed
2.	7/24/79	SSA-847 (transmittal form) forwarding folder from ODO to DDS
3.	8/7/79	DDS recd folder
4.	8/7/79	DDS unsuccessful phone call to claimant regarding VA treatment
5.	8/8/79	DDS called claimant again (left message)
6.	8/14/79	DDS prepared ltr to VA for updated Med. evidence but did not send because of no Med. releases
7.	7/21/79	DDS sent Med. releases to claimant for signature
8.	8/22/79	Claimant called DDS regarding last VA treatment
9.	8/29/79	DDS called D/O to obtain Med. releases from claimant
10.	9/6/79	Claimant signed med. releases

11.	9/20/79	DDS examiner signed and physician countersigned determination (833) cessation
12.	9/24/79	DDS forwarded file to ODO
13.	9/26/79	ODO recd folder
14.	10/25/79	Date of recon cessation notice DDS did not obtain any evidence from the VA on recon

CASE 34 B

1.	10/10/78	Recon requested by claimant
2.	10/10/78	D/O released file to DDS
3.	10/16/78	DDS examiner sent request to treating source
4.	10/18/78	DDS receives Medical report from treating physician
5.	10/24/78	DDS examiner signed determination
6.	10/27/78	DDS physician signed determination
7.	11/2/78	Run date
8.	11/10/78	Date of Notice to claimant of allowance

CASE 35 B

1.	8/17/78	Recon requested
2.	8/17/78	D/O released file to DDS
3.	8/25/78	DDS examiner requested VA Med. evidence
4.	8/28/78	VAH evidence received in DDS
5.	8/29/78	Examiner and physician signed determination in DDS
6.	9/12/78	Systems input of denial
7.	9/13/78	Hearing requested

CASE 36 A, B, F, Q

1.	10/17/79	Request for Recon—DO
2.	10/23/79	Letter from clt attorney appt. form
3.	10/31/79	Letter from clt attorney—hold case for completion of forms

4. 11/30/79 Letter from clt attorney—Forms lost. Please send new forms
5. 12/26/79 Letter *to* attorney. Please submit forms
6. 12/31/79 Recon disability Report mailed to DO
7. 12/31/79 Case sent to DDS-DO
* 01/07/80 Request to treating physician for evidence by DDS examiner
* 01/07/80 Letter sent to attorney by DDS examiner
8. 1/9/80 DDS letter to attorney requesting reports attorney said would submit
9. 1/18/80 DDS received medical report from attorney
10. 1/18/80 RFC-DDS
11. 1/24/80 DDS vocational assessment—DDS
12. 1/28/80 Determination signed
* 1/31/80 Hospital report received
13. 2/1/80 DDS input to system
14. 2/5/80 System run date for payment

CASE 37 B, D

1. 10/15/79 Request for Recon—DO
2. 10/15/79 Recon disability report—DO
3. 10/19/79 Sent to DDS-DO
4. 10/22/79 Received DDS
5. 10/22/79 Medical report request to treating MD—DDS
6. 10/30/79 Medical report received from treating MD
7. 11/2/79 RFC-DDS
8. 11/13/79 DDS systeme [sic] input
9. 11/13/79 Denial affirmed—DDS
10. 11/15/79 Released to DO
11. 11/14/79 Run date for notice

CASE 38 G

1. 9/13/79 Recon filed; Case to DDS
2. 9/17/79 File received in DDS
3. 9/18/79 Examiner signed determination

4.	9/19/79	DDS dr. countersigned
5.	9/20/79	DDS systems input
6.	9/20/79	DO systems input
7.	9/24/79	Systems run; case to DO
8.	9/25/79	Case received in DO
9.	9/29/79	Letter of denial to Claimant

CASE 39 D, F, Q

1.	3/15/79	Filed reconsideration request; Letter dated 3/12 received from claimant with review of history of symptoms and medical treatment; Letter to claimant dated 3/8/79 from Dr. Robert J. Chapman received in DO 3/15; Case to DDS
2.	3/19/79	Case received in DDS
3.	3/21/79	Tel/c to dr's office, letter to Dr. for information
4.	3/22/79	Med. releases sent to claimant
5.	3/28/79	Letter received from claimant with signed medical release forms
6.	3/29/79	Diagnostic evaluation done in 6/78 and exam on 1/9/79 received from Dartmouth Med. School
7.	4/12/79	Letter dated 4/15/79 from Dr. Chapman; Tel/c to claimant re med. releases
8.	4/20/79	Determination signed by examiner—Denial
9.	4/23/79	Determination countersigned by DDS Md. Case selected by DDS for DDSQA review
10.	4/25/79	Systems input by DDS
11.	4/26/79	Case to DO; Systems run
12.	5/1/79	Letter dated 5/1/79 to claimant

CASE 40 D, Q

1.	6/16/79	Reconsideration filed
2.	not dated	CE authorized by DDS M. D.
3.	6/18/79	Med. releases sent to claimant for signature

4.	6/19/79	Ltr to claimant re consultative exam on 7/11/79
5.	7/19/79	Consultative examination rep't received; also, DO systems input
6.	7/20/79	Examines sized determination Dr. countersigned DDS selected case for QA review
7.	8/1/79	DDS systems input-allowance
8.	8/1/79	Systems RUN which triggered the letter of allowance to claimant

CASE 41 D, F, J, Q

1.	6/13/78	Reconsideration filed
2.	6/13/78	Case rec'd in DDS
3.	6/19/78	Ltr to T/MD re updated information
4.	9/19/78	Consultative exam req'd.
5.	10/18/78	Tel/C Dr. re report
6.	10/27/78	Consult rep't. rec'd. (Exam on 10/3 and 10/3 report dated 10/24/78)
7.	10/30/78	Examiner signed-allowed DDS MD countersigned Case selected by DDS for QA review systems
8.	10/31/78	DDS systems input; folder to DO
9.	11/1/78	DO received folder
10.	11/2/78	DO made systems input
11.	11/10/78	Letter to claimant allowed

CASE 42 B, Q

1.	12/23/77	Request for recon
2.	12/28/77	File released to DDS
3.	1/3/78	File received in DDS
4.	1/4/78	Medical evidence requested by DDS examiner
5.	1/16/78	Determination signed by DDS examiner and physician
6.	1/16/78	Notice of denial released to claimant QA involved

CASE 43 D

1. 12/1/77 Request for recon
2. 12/5/77 Sent to DDS
* 12/7/77 Req. Med. Evidence
3. 12/7/77 Received in DDS
4. 12/16/77 Report received from treating MD
5. 1/12/78 Telephone contact with treating MD by DDS
6. 1/16/78 Determination signed-affirm
7. 1/18/78 Sent to DO
8. 1/20/78 Received in DO
9. 1/20/18 Run date for notice

CASE 44 B, D

1. 10/10/79 Recon request—DO
2. 10/10/79 Recon Disability report—DO
3. 10/10/79 Sent to DDS—DO
4. 10/15/79 Received DDS
5. 10/15/79 DDS requests report from treating MD
6. 10/22/79 Report received from treating MD
7. 10/30/79 Determination signed-affirm
8. 11/1/79 Notice released

CASE 45 B, D, Q

1. 10/5/78 Claimant filed recon request
2. 10/6/78 D/O released file to DDS
3. 10/10/78 Folder received in DDS
4. 10/10/78 Request sent to treating source by DDS examiner
5. 12/21/78 DDS received Med. evidence from treating source
6. 12/26/78 Determination signed by DDS examiner and physician
7. DDS QA
8. 12/28/78 DDS physician's analysis requests additional Med. evidence
9. 1/10/79 DDS examiner makes phone contact with treating source

10.	1/11/79	Letter of request sent to Hospital, for additional evidence by DDS examiner
11.	1/22/79	DDS received additional Med. evidence
12.	1/27/79	DDS input allowance in systems
13.	1/24/79	DDS released folder to D/O
14.	2/2/79	Systems run date of payment

CASE 46 B, D, Q

1.	4/2/79	Reconsideration filed
2.	4/3/79	Attorney reviewed file
3.	4/10/79	Ltr. rec'd from attorney re recon.
4.	4/13/79	Ltr from attorney returning Medical release forms
5.	4/19/79	Recon disability report (SSA-3441) rec'd in Mail; Case forwarded to DDS
6.	4/27/79	Req. for consultative exam with copy of ltr to attorney
7.	4/30/79	Ltr to claimant re CE appt., 5/3/79
8.	5/18/79	Rept. rec'd from North County Hosp. and from Dr. James Moss dated 5/11/79
9.	5/24/79	Vocational assessment by Voc-specialist
10.	5/25/79	Determination signed by Examiner and denial
11.	5/28/79	Countersigned by MD in DDS
12.	5/31/79	Case selected by DDS for QA review. DDS systems input—denial; letter typed to claimant by DDS with a copy to attorney; folder to DO

CASE 47 B, D, F, Q

1.	4/9/79	Reconsideration filed; SSA 3441 Recon. disability rept.
2.	4/10/79	File to DDS
3.	4/18/79	Case rec'd in DDS
*	4/19/79	Ltr to T/MD for Med. info.
4.	4/24/79	Statement of Claimant (SSA-795) Re Med. treatment

*	4/25/79	Ltr. to a Dr. Munch for info.
*	5/21/79 & 5/30	T/C to Dr. Jamison for more Med.
5.	5/31/79	T/C with Dr. Paul Jamison (T/MD) re current condition
6.	6/7/79	Statement by DDS MD re Med. Condition "slight"
7.	6/11/79	Examiner signed determination DDS MD countersigned (Denial) DDS selected case for QA review
8.	6/13/79	DDS systems input; Case to DO
9.	6/14/79	DO systems input
10.	6/19/79	Letter dated this date to claimant—denial QA involved

CASE 48 B, D

1.	4/21/79	Req. for recon. taken over telephone
2.	4/23/79	Formal date stamp for recon as (SSA 561) rec'd in mail
3.	4/23/79	Case to DDS
4.	4/26/79	Case rec'd in DDS
*	4/26/79	DDS request updated VA evidence and ordered psy C/E
5.	5/2/79	VA report received for treatment 1/7/79-2/15/79
6.	5/17/79	Psychiatric report dictated dated 5/1/79. This was a consultative examination
7.	6/20/79	Consultative report rec'd 6/20/79
8.	6/22/79	Examiner signed decision to affirm denial
9.	6/25/79	DDS MD signed determination
10.	6/29/79	CAPS Run date for denial (Decision later reversed by ALJ)

CASE 49 D, Q

1.	4/2/79	Filed for reconsideration; also took SSA 3441 disability report
2.	4/19/79	File sent to DDS

3.	4/20/79	Folder rec'd in DDS
•	4/26/79	Ltr to Dr. Maxfield
•	6/6/79	Follow-up by letter to Dr. Maxfield
•	6/8/79	Rept rec'd from Dr. Maxfield dated 5/2/79
4.	6/11/79	Residual function cap. by Dr. Frost
•.	6/29/79	DO systems input
5.	7/19/79	Report from DDS Vocational specialist
6.	7/19/79	DDS examiner signed determination-affirmed denial
7.	7/23/79	DDS MD signed det. DDD selected case for QA review
8.	7/26/79	Case to DO; DDS systems input
9.	7/27/79	CAPS Run-denial (Later reversed by hearing)

CASE 50 B, D, F, I, Q

1.	11/4/77	Recon requested filed by Cl; recon disability Info. with Cl.
2.	11/18/77	Case rec'd in DDS. Clt. resident of N. H. but apparently confined to VAh in Vermont at time of initial decision
3.	11/22/77	Ltr to dr (T/MD) for Med. Info.
4.	12/2/77	Request for school counselor's report
5.	12/5/77	Claimant T/C DO entering hosp. for surgery
6.	12/8/77	Letter to dr. re surgery
7.	12/12/77	DDS MD called T/MD for info. Would not give info. by phone; Letter sent
8.	1/12/78	T/C to Dr. (office closed)
9.	1/13/78	Rept. rec'd from T/MD. Claimant had surgery and is in hosp.
10.	1/18/79 & 1/19/79	T/C to T/MD by DDS Md.
11.	1/19/78	Esaminer [sic] signed determination. Countersigned by doctor. Case selected for DDS QA review.
12.	1/23/78	Case to D/O
13.	1/27/78	DO triggered award

14.	2/2/78	Systems exception
15.	2/23/78	DO sent to BDI
16.	3/24/78	Award prepared by BDI
17.	3/30/78	Entered MADCAP
18.	4/6/78	Exception to input
19.	4/17/78	Re-entered input
20.	4/19/78	Exception of input
21.	5/5/78	Orbit purged
22.	6/8/78	Benefit summaries prepared
23.	6/9/78	Benefit data entered into system
24.	6/16/78	Award notice mailed

CASE 51 B, D, F, Q

1.	10/10/79	Recon filed
2.	10/15/79	Case rec'd in DDS; ref'd hosp. info.
3.	10/18/79	Letter rec'd from attorney
4.	10/22/79	Report rec'd from Dr. Herbert L. Martin; report rec'd. from Dr. Moshe Ziv; report rec'd from Medical Center Hospital
5.	11/2/79	Residual functional capacity by DDS MD
6.	11/5/79	T/C with attorney for claimants' typed for CE
7.	11/6/79	Tel/Contact with attorney; request for letter to be typed for CE
8.	11/17/79	Requested out-of-state consultative typed
9.	11/26/79	Apt. for CE
10.	11/30/79	CE report received in Florida DDS
11.	12/17/79	CE report rec'd from Fla. DDS
12.	12/20/79	Psychiatric functional capacity opinion by DDS MD
13.	12/28/79	Vocational assessment by DDS consultant
14.	1/2/80	Examiner signed determination and DDS MD countersigned Case selected by DDS for QA review
15.	1/5/80	DDS systems input-allow

16.	1/8/80	Folder sent to DO
17.	1/9/80	Systems run—letter of allowance sent to claimant QA involved

CASE 52 D, F, Q

1.	10/5/79	Request for recon. filed work activity report taken request of Med. info. from treating MD (All by DO)
2.	10/22/79	Recon. disability rep't. (SSA-3341) signed by claimant
3.	10/23/79	Med. rept. rec'd from T/MD, Dr. Le Branc C. Burns
4.	10/25/79	DO shipped folder to DDS
*	10/29/79	Folder rec'd in DDS
5.	11/8/79	VA report received
6.	11/27/79	Supplemental rept. rec'd from Dr. Burns
7.	12/10/79	Telephone call to Dr. Burns by DDS MD. Also, residual functional capacity evaluation made
8.	12/27/79	Med. consultative exam approved by DDS MD. Letter of req. sent to claimant
9.	12/31/79	App't for consultative exam
*	1/3/80	Dictated consultant's rept was taken by transcription (telephone)
10.	1/8/80	Consult rept. rec'd. from Hospital. DDS MD reviewed and gave statement re RFC
11.	1/10/80	Examiner signed determination—allowed
12.	1/15/79 [sic]	DDS doctor signed determination (Case selected by DDS for QA review)
13.	1/16/80	Rec'd. rept. signed from consult exam MD
14.	1/21/80	Folder to DO
15.	1/22/80	Run CAPS allowance processed—PAID

CASE 53 B, F

1.	2/23/79	Filed for reconsideration also, furnished SSA-3441 "Recon. disability rept." Furnished a copy of rept. from Dr. Alan Rubin and V. R. letter to him stating their services wouldn't help in allowing him to return to work. Also furnished ltr. from Richard L Sortell regarding 8 days of work he had performed. Mr. Sortelle is Pres. of Comm. Services
2.	3/19/79	File to DDS
3.	3/20/79	File rec'd in DDS
*	3/22/79	Requested rept. from Dr. Edwards
*	3/22/79	Voc. form to claimant
4.	4/9/79	Vocational report (SSA-3369)
*	4/29/79	Follow up to Dr. Edwards
5.	6/6/79	DO called DDS re recon. and was told case still pending
*	6/7/79	Follow up phone call to Dr. Edwards
6.	6/15/79	Rept. rec'd dated 5/29/79 from Dr. John R. Edwards
7.	6/18/79	Determination signed by examiner and DDS MD. Denial affirmed
8.	7/10/79	DO called DDS re recon. and was told case still pending
9.	7/24/79	DDS input—denial CAPS run same date. However, DDS sent denial ltr to claimant and cc. to Mr. Sortelle (social worker)
10.	7/24/79	Case ret'd to DO

CASE 54 B, D, F, L, Q

1.	2/5/79	Request for recon in D/O
2.	2/7/79	File released to DDS by D/O rep.
3.	2/8/79	File received in DDS
4.	2/8/79	Request for Medical report by DDS
5.	2/14/79	RFC analysis by DDS
6.	2/14/79	Consultative exam scheduled by DDS examiner

7. 2/16/79 Form sent to CE for authorization by DDS examiner
8. 2/21/79 Med. report received from treating physician
9. 3/6/79 Consultative exam performed
10. 3/12/79 Report of CE received in DDS
11. 3/12/79 Vocational assessment by DDS Voc. Specialist
12. 3/12/79 Determination signed by DDS exam and physician
13. 3/23/79 Vocational report sent to claimant
14. 4/3/79 Phone attempt to claimant re vocational report by DDS examiner
15. 4/5/79 DDS examiner called D/O re former employer
16. 4/5/79 DDS examiner released letter to former employer
17. 4/19/79 Phone call from claimant received by DDS examiner
18. 4/26/79 Vocational report received by DDS
19. 4/27/79 Systems input by DDS
20. 4/30/79 Systems run date
21. 5/6/79 Notice of denial to claimant
QA involved

CASE 55 D, F, Q

1. 11/7/79 Reconsideration filed
2. 11/14/79 Case received in DDS; telephone call to Mental Health Services
3. 11/19/79 Rept. rec'd from Mental Health Services
4. 11/29/79 Residual function capacity by DDS MD.
5. 12/11/79 Psychiatric functional restriction opinion by DDS MD
6. 12/14/79 Request for consultative exam
7. 12/27/79 Consultative appointment report dictated
Consultative rept. rec'd but wasn't dated as to receipt date

8.	1/10/80	Examiner signed determination. Dr. countersigned. DDS selected case for QA review
9.	1/17/80	DDS systems input-allowance; case to DO
10.	1/21/80	System run QA involved

CASE 56 B, D, F

1.	5/8/79	Filed for reconsideration
2.	5/10/79	Reconsideration disability rept.
3.	5/11/79	Telephone contact with claimant's wife. She called due to her concern for claimant
4.	5/22/79	Case rec'd in DDS; letter to VA for outpatient records
5.	6/18/79	Claimant's wife called DO re his being in hospital
6.	6/19/79	T/C claimant released from VAH
7.	6/20/79	Report of telephone call rec'd in DDS
8.	6/21/79	Ltr. to hosp. for summary; re-req'd. VAH info.
9.	7/2/79	Authorization rec'd re release of Med. info. rec'd rept. from Central Vermont Hosp. (Adm. 5/19/79 to 6/1/79)
10.	7/17/79	T/C someone will take claimant to VAH
11.	7/26, 8/2 8/21, 8/23, 8/28, 9/7/79	T/C (Follow up) to VAH for info.
12.	9/10/79	Rec'd VAH rept.
13.	9/14/79	Vocational spec. assessment and doctor (DDS) assessed residual functional capacity
14.	9/14/79	Examiner signed determination denial DDS-MD also signed det.
15.	9/18/79	DDS denial input. Case ret'd to DO Run date 9/19/79
16.	9/19/79	DDS denial input. Case ret'd to DP run date 9/19/79
17.	9/24/79	Ltr of denial to claimant

CASE 57 D, F, L

1.	3/16/79	Recon filed
2.	3/20/79	Case to DDS
3.	3/21/79	Case received in DDS; Consultative examination authorized
4.	3/22/79	Letter to claimant re consult ——— on 4/2/79; a statement from the employee dated 3/19/79 received by DO
5.	4/3/79	W/E didn't keep appt. for phone contact.
6.	4/3/79	Examiner signed determination.
7.	4/11/79	Dr. countersigned determination
8.	No date	2 phone attempts to locate claimant
9.	7/23/79	Tel. contact trying to contact claimant
10.	8/17/79	Residual functional capacity by DDS MD
11.	9/29/79	The SSA-834 rational dated this date
12.	10/3/79	DDS systems input—denial; file to DO
13.	10/4/79	Systems run—Denial
14.	10/9/79	Letter to claimant, this date.

CASE 58 B, D, Q,F

1.	10/13/77	Reconsideration filed; case sent to DDS
2.	10/17/77	Case received in DDS; T/C ck'd with VA for additional information
3.	11/16/77	T/c VA said he has appt. 9/20 and 11/15
4.	11/23/77	T/c appt. T/c file not in record room—VA
5.	12/1/77	Determination signed by disability examiner
6.	12/5/77	Determination signed by DDS Doctor
7.	12/6/77	Case to QA for review
8.	12/8/77	Eye C.E. ordered
9.	Not date stamped	VA rep't. treatment from 9/20/77 to 11/15/77 received
10.	12/15/77	T/c to claimant re med. info.
11.	1/4 & 17/78	T/c for report from CE.
12.	1/25/78	Consultative eye exam done on 12/12/77, but received on 1/25/78
13.	2/2/78	Denial letter typed by DDS with copy to Michael A. Corcoran, atty. VA Center Folder to DO

14.	2/6/78	Case received in DO QA involved

CASE 59 B, Q

1.	10/25/79	Recon. filed; additional medical evidence provided
2.	10/25/79	DO sent case to DDS
3.	10/29/79	DDS received folder
4.	11/7/79	Examiner signed determination DDS MD countersigned (Denied)
5.		DDS selected case for QA review
6.	1/7/80	Residual Functional Capacity by DDS MD
7.	1/9/80	Examiner signed SSA-834 (second page of SSA-831) Denied
8.	1/15/80	Denial letter typed by DDS as copy to attorney. Letter dated this date
9.	1/15/80	DDS systems input; Case to DO Note: Can't tell how the 2 months delay occurred, if QA was bogged down or if the DDS Md was or if the examiner did not take timely action. Worksheet was blank

CASE 60 F, J, Q, L

1.	2/21/78	Request for recon filed
2.	3/8/78	Released file to DDS by D/O
3.	3/13/78	File received in DDS
4.	3/29/78	File referred to DDS physician by DDS exam
5.	5/5/78	Attempt phone call to claimant. Unable to locate by DDS exam
6.	6/27/78	Claimant called by DDS to give new address
7.	6/27/78	Vocational report signed by claimant

8.	6/27/78	Vocational evaluation prepared by DDS VS
9.	8/4/78	DDS physician discussed case by phone with regional office physician
10.	9/12/78	DDS examiner and physician signed determination of denial
11.	9/13/78	DDS input decision into systems
12.	9/21/78	D/O input decision into systems
13.	9/22/78	Run date
14.	9/30/78	Date of notice of denial released to claimant

CASE 61 B, J, Q

1.	12/5/79	Recon filed; case to DDS
2.	12/10/79	Rec'd in DDS; Letter to T/MD
3.	12/31/79	Report received form Dr. James E. Simpson
4.	1/3/80	Residual Functional Capacity by DDS MD
5.	1/7/80	Determination signed by examiner
6.	1/8/80	Dr. countersigned determination
7.	1/17/80	DDS system input—denial. No DO system input to match, File to DO
8.	1/22/80	DO systems input on record. Run generated. Initial letter triggered instead of recon Note: When claimant came in after receiving initial denial letter the DO took another recon., but after checking they realized they should have taken a hearing.

CASE 62 D, Q

1.	6/13/78	Reconsideration filed by claimant; also by Dr. George W. Brooks of Vermont State Hospital
2.	6/15/78	Report received dated 6/12/78 from Dr. Grace Anthony

3.	7/6/78	Letter to claimant from DO re rep. payee. Also case sent to DDS.
4.	7/10/78	Case received in DDS' letter to Vermont State Hospital
5.	7/17/78	Vermont State Hospital report received
6.	7/17/78	Examiner (DDS) signed case as continuing
7.	7/18/78	DDS MD signed determination
8.	7/31/78	DDS QA reviewed case and sent to BDI. Also, unassociated medical report to BDI.
9.	8/18/78	MOD 1 reviewed and signed
10.	8/23/78	SSA-559 to claims authorizer from claims examiner with instructions regarding letter to claimant re benefits
11.	9/1/78	SSA-525B for rep. payee development
12.	10/3/78	SSA-559 from Cl. auth to Benefit auth. re reinstatement of benefits to be paid to State Hospital
13.	11/6/78	Personally typed letter to Vermont State Hospital re the amount they would be receiving for claimant

CASE 63 B, F, I

1.	7/23/79	Due Process notice released to claimant re cessation
2.	10/26/79	Request for recon received in D/O
3.	10/29/79	Letter of affirmation of cessation released by ODO benefit authorizer
4.	12/12/79	Systems termination of benefits
5.	12/28/79	Letter received ordering expeditious handling of case
6.	1/3/80	Recon disability report received in DDS from claimant
7.	1/4/80	Request for recon received in DDS
8.	1/4/80	Request sent for additional medical evidence, by DDS
9.	1/4/80	Additional medical evidence received from attorney

10.	1/7/80	File received in DDS from ODO
11.	1/11/80	Phone call to source to expedite medical evidence examined by DDS
12.	1/14/80	Additional medical evidence received from treating source
13.	1/15/80	Phone contact with treating source for clarification by DDS exam
14.	1/15/80	Determination signed by DDS examiner and physician
15.		File released to ODO for reversal to continuance
16.	1/31/80	ODO examiner signed determination
17.	1/31/80	Folder released to benefit authorizer for reinstatement of benefit payments
18.	2/15/80	Determination of resumption of award signed by benefit authorized input
19.	2/22/80	Systems resumed benefit payments
20.	3/10/80	Final complete notice released to claimant

CASE 64 G

1.	9/26/78	Recon request received
2.	9/27/78	D/O released file to DDS
3.	10/6/78	Determination signed by examiner and physician
4.	10/10/78	Systems input by DDS examiner, case to DO
5.	10/18/78	Systems input by D/O Rep.
6.	10/18/78	Run date
7.	10/24/78	Notice of denial released to claimant

CASE 65 B, Q

1.	8/29/78	Reconsideration filed
2.	8/30/78	File sent to DDS
3.	9/1/78	File rec'd in DDS
4.	9/5/78	Request sent to treating source by DDS exam
5.	9/12/78	Examiner signed determination Doctor countersigned

6.	9/18/78	DDS system input denial
7.	9/19/78	Case sent to DO
8.	10/5/78	DO system input No recon. letter generated to claimant according to file and report of contact with claimant on 2/2/79. Note: Hearing filed 12/21/78

CASE 66 B, D

1.	2/26/79	Recon. filed
2.	2/26/79	File to DDS
3.	2/28/79	Rec'd in DDS
4.		Report not dated VA report for treatment through 2/27/79
5.	3/12/79	Examiner signed determination
6.	3/13/79	DDS Md signed determination
7.	3/20/79	DDS System input; Folder to DO
8.	3/21/79	DO systems input
9.	3/27/79	Letter of denial to WE

CASE 67 D, F

1.	8/24/79	Claimant filed recon request
2.	9/5/79	D/O forwarded folder to DDS
3.	9/11/79	DDS rec'd folder
4.	9/11/79	DDS requested medical evidence from Dr. Dee Boff and Albany Medical Center
5.	9/24/79	DDS received medical report from Stuart Dee Boff, M.D.
6.	9/26/79	DDS phoned Albany Medical Center for follow-up; they had not received request
7.	10/1/79	DDS phone Dr. Dee Boff
8.	10/19/79	DDS contacted claimant via telephone for more information
9.	10/30/79	DDS examiner signed determination (831)
10.	10/31/79	DDS physician signed 831

11.	11/7/79	DDS input notice
12.	11/8/79	DDS forwarded file to D/O
13.	11/13/79	Date of recon denial notice

CASE 68 D, F, Q

1.	8/17/79	Request for Recon.; Recon Disability Report
2.	8/27/79	Case sent to DDS
3.	8/28/79	Case rec'd in DDS; letter to T/MD; letter to hospital
4.	10/5/79	Follow-up to T/MD for report; Consultative exam. authorized
5.	10/25/79	Letter to claimant for CE
6.	11/2/79	CE performed
7.	11/7/79	Follow-up T/MD for report
8.	11/8/79	C.E. Transcribed
9.	11/13/79	Determination signed—affirmed
10.		DDS selected case for QA review
11.	11/20/79	Case released to DO and systems input
12.	11/21/79	Case rec'd in DO
13.	11/23/79	Systems run date

CASE 69 B, D

1.	8/29/78	Request for recon filed
2.	8/29/78	Recon disability report submitted by claimant
3.	8/30/78	Folder released to DDS by D/O Rep.
4.	9/6/78	Folder rec'd in DDS; letters to Md. and VAH
5.	9/17/78	Medical evidence requested from VAH by DSS examiner
6.	9/13/78	Earnings record signed by Bureau of Data Processing Rep.
7.	9/19/78	VAH medical report received in DSS
9.	9/22/78	Systems input by D/O Rep (re insured status?)
9.	9/26/78	Determination signed by DDS examiner

10.	9/28/78	Determination siged [sic] by DDS physician
11.	10/5/78	DDS systems input
12.	10/6/78	Run date
13.	10/16/78	Notice of denial released to claimant

CASE 70 B, J, Q

1.	3/27/79	Filed for reconsideration; Rec'd SSA-827B-Med. Info. form; File sent to DDS
2.	3/28/79	File received in DDS
3.	4/17/79	DDS Md. reviewed case
4.	4/18/79	DO system input; Systems run date; Examiner signed determination
4.	4/19/79	DDS MD countersigned determination
5.	4/19/79	DDS MD countersigned determination
6.		Case selected by DDS for QA review
7.	4/23/79	DDS systems input
8.	4/24/79	Claim sent to DO
9.	5/7/79	Generated letter note stamped in DO, but no date on letter and no message—letter blank

CASE 71 D, F, Q

1.	2/14/79	Claimant requested recon
2.	2/23/79	D/O forwarded
3.	2/28/79	DDS received folder
4.	3/1/79	Requested VA output
5.	3/7/79	DDS received report of 3-5-79 from White River Jct., Vt. VA report
6.	3/12/79	DDS physician completed residual functional capacity assessment
7.	3/21/79	DDS received by examiner with claimant and VA regarding additional medical information
8.	3/23/79	DDS examiner signed determination and the same examiner completed vocational analysis

9.	3/26/79	DDS physician signed determination DDS QA
10.	3/30/79	DDS input denial
11.	4/3/79	Date run for denial notice
12.	4/9/79	Date or recon denial notice

CASE 72 B, J, Q

1.	2/15/79	Claimant filed recon request
2.	2/15/79	D/O forwarded recon to DDS
3.	2/16/79	DDS received folder; letter to hospital and T/MD
4.	2/26/79	DDS received 2-21-79 report from John M. Perry, Md.
5.	2/27/79	Follow-up to hospital for report (by mail)
6.	3/2/79	DDS received medical records from central Vermont hospital; a form 3369 with cover letter
7.	3/14/79	DDS examiner signed determination (831)
8.	3/15/79	DDS physician signed 831
9.	3/16/79	DDS informational report of contact regarding past work
10.	3/19/79	DDS input denial
11.	3/20/79	DDS returned folder to D/O
12.	3/22/79	D/O re-input—date run
13.	3/27/79	Date of recon denial notice

CASE 73 B, D

1.	2/15/79	Claimant filed for recon
2.	2/27/79	ODO transmitted filed to D/O after QA review (SSA-559 dated 2-27-79
3.	3/12/79	D/O received folder
4.	3/12/79	D/O forwarded folder to DDS
5.	3/13/79	DDS received folder
6.	3/26/79	DDS received 3-21-79 report from Dr. Marcia Hemley

7.	4/18/79	DDS received 4-16-79 report from Dr. Willard Reger
8.	4/19/79	DDS examiner signed determination (831)
9.	4/27/79	DDS physician signed 831
10.	5/9/79	DDS input denial notice—date run 5-9-79 to BDI
11.	5/14/79	Date or recon denial notice

CASE 74 F, G, J

1.	8/29/79	Request for recon filed
2.	8/30/79	Recon disability report submitted by claimant
3.	9/7/79	D/O Rep. inputs into systems
4.	9/10/79	Determination signed by examiner and physician
5.	9/14/79	Systems input by DDS Rep.
6.	9/17/79	Folder sent to D/O by DDS
7.	9/26/79	Phone contact with claimant by D/O claims Rep.
8.	9/26/79	Systems input by D/O Rep.
9.	9/26/79	Run date
10.	10/3/79	Hearing request filed

CASE 75 D, F, Q, L

1.	4/3/79	Request for recon received
2.	4/16/79	File released by D/O to DDS
3.	4/18/79	File received in DDS
4.	4/19/79	Consultative examination scheduled
5.	5/8/79	Letter received from claimant (refusing CE)
6.	5/8/79	Consultative examination cancelled
7.	6/27/79	Phone contact with treating source
8.	7/2/79	Determination signed by DDS examiner
9.	7/3/79	Determination signed by DDS physician
10.	7/20/79	Systems input (DDS)

11.	7/20/79	Run date
12.	7/25/79	Notice of denial released to claimant

CASE 76 D, Q, K

1.	6/9/78	Request for recon filed
2.	7/5/78	Received by DDS from D/O
3.	No date	Additional medical evidence received by DDS
4.	7/6/78	Hospital and doctor reports requested
5.	8/1/78	DDS examiner and physician signed determination
6.	?	QA involved
7.	8/10/78	Run date—rejected due to systems limitatations (reopening to continuance)
8.	8/10/78	File released to D/O by DDS
9.	8/18/78	Letter released re resumption of benefits
10.	9/12/78	ODO input resumption of payments due to systems limitation

CASE 77 B, D

1.	12/15/77	Filed reconsideration
2.	1/5/78	File to DDS
3.	1/13/78	Med. evidence received in DDS from BDI-Mod 1 from Dr. Donoghy
4.	1/13/78	Determination signed by examiner ceased
5.	1/16/78	Countersigned by DDS Md.
6.	1/16/78	File to BDI
7.	2/3/78	BDI-Mod 1 QA sent case to Med. Staff for review
8.	3/3/78	DDS Md. gave a statement re severity
9.	3/13/78	SSA-1774 sent to DDS for additional medical dev. in the way of a Psychiatric examiner
10.	3/23/78	Case received in DDS; DDS Md. requested CE; letter to claimant re app't. 3-30-78; letter to Med. Consultant re request for CE

11.	3/29/78	T/C from DO—Report of contact "dire need"
12.	4/13/78	Consult report received in DDS
13.	5/2/78	Med report received from treating physical dated 5-27-78
14.	5/16/78	SSA 1407 VR referral; examiner signed determination and DDS Md countersigned allowed. (831 made instead of 833
15.	5/17/78	To BDI
16.	6/5/78	Decision on SSA-833
17.	6/5/78	Mod-1 sent SSA 559 to reinstate to benefit authorizer
18.	6/28/78	Benefit authorizer prepared notice for computer systems input
19.	7/3/78	Systems Run
20.	7/19/78	Letter to claimant—reinstatement

APPENDIX 1

Department of
HEALTH, EDUCATION, AND WELFARE
Social Security Administration
Bureau of Hearings and Appeals

DECISION OF APPEALS COUNCIL

In the case of
LEON S. DAY
(Claimant)

(Wage Earner) (Leave blank if same as above)

Claim for
Continuance of Period of Disability
and Disability Insurance Benefits

008-16-8830
(Social Security Number)

ON REMAND FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF VERMONT
(Civil Action Number 79-102)

The Appeals Council adopts the recommended decision of June 27, 1980, and holds that the claimant continues to be entitled to a period of disability and to disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act, as amended.

APPEALS COUNCIL

/s/ Manny H. Smith
MANNY H. SMITH
Member

/s/ Joseph E. Doneghy
JOSEPH E. DONEGHY
Member

Date: 12 Sept. 1980

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Civil Action File No. 78-266

LEON S. DAY and AMEDIE MAURAIS, on behalf of themselves and all others similarly situated, PLAINTIFFS

v.

PATRICIA ROBERTS HARRIS, Secretary, United States Department of Health and Human Services, DEFENDANT

DEFENDANT'S ANSWERS AND OBJECTIONS TO PLAINTIFFS' THIRD INTERROGATORIES AND REQUESTS FOR ADMISSIONS

Now comes the defendant, Secretary of the Department of Health and Human Services, and hereby answers plaintiffs' Third Interrogatories and Requests for Admissions pursuant to Rules 33 and 36, Federal Rules of Civil Procedure.

PLAINTIFFS' THIRD INTERROGATORIES

1. In response to plaintiffs' Second Interrogatory No. 1 dated January 14, 1980, information on 421 "initial denial" reconsideration cases was provided. By plaintiffs' count, some 291 of these cases took over thirty days to process to the point of DDA clearance. (See Attachment A to Answer to Second Interrogatory No. 1). For each said case, please provide a description of each action taken by DO, DDA, and/or ODO employees or contractors, including the location and date each said action occurred. Your answer should specifically include discussion of all efforts made to gather additional medical evidence, including mention of the name or title of the person who requested and who decided such additional evidence was necessary. Your answer should cover the entire period from date of receipt of reconsideration request at DO to date reconsideration determination is mailed the claimant.

2. The response to plaintiffs' Second Interrogatory No. 1 also included information on 31 "cessation" reconsideration cases. Please provide the same information within the same guidelines for each one of these cases as is requested in the preceding Interrogatory.

3. For each of the 322 reconsideration cases in the two preceding Interrogatories, in how many cases did the claimant, contemporaneously with or after requesting reconsideration:

A. Request a delay in the processing of the case.

B. Bring new medical problems or evidence to the defendant's attention that was unavailable in the making the initial determination.

C. Request that new medical examination(s) be scheduled.

(If any individual case fits more than one of the above three categories, please so indicate.)

4. For each of said 322 cases, please indicate in how many cases did the defendant or any agent unilaterally decide to gather additional medical evidence.

5. For each case noted in answering the preceding Interrogatory, please state what information was available to defendant or her agents leading to the decision to seek new medical evidence that was not available at the time the initial determination was made.

6. For each of the 322 cases discussed hereinabove, in how many cases did defendant or her agents conduct face-to-face interviews with claimants between request for reconsideration and reconsideration determination?

7. In reconsideration cases where the claimant does not cause a processing delay and where no new medical evidence need be gathered, carefully state what factors make defendant unable to issue reconsideration determinations within thirty (30) days in:

A. Initial Denial cases.

B. Cessation (CDI) cases.

8. Of the 322 cases discussed hereinabove, please state in how many cases was processing unaccomplished after thirty (30) days due to:

A. Increased caseload

B. Insufficient staff

C. Insufficient resources

D. Administrative error

E. Any other non-claimant caused factor

(If any case fits more than one of the above five categories, please so indicate.)

OBJECTION TO INTERROGATORIES 1-8

Defendant objects to providing answers to these interrogatories on the ground that it would be overly burdensome for the Social Security Administration to conduct a manual, file-by-file search of 322 individual claims.

For the Social Security Administration to obtain the information requested by plaintiffs, it would be necessary to obtain and then to manually examine each of the 322 claims folders. Such a burdensome activity would involve special computer programming to locate each folder, since folders could be located in any one of a number of locations. The folder could be located either in a social security district or branch office, a central SSA headquarters location, or in one of the many hearings offices throughout the nation. It could also be located in the SSA regional office, one of the State DDA offices (not necessarily Vermont, since a claimant could have moved from Vermont since the findings on the reconsideration claim), or at the Office of Hearings and Appeals in Arlington, Virginia, or SSA Headquarters in Woodlawn, Maryland. For those cases in which the computer print out does not reflect the current folder location, a special search would have to be conducted. Once the folders are located and obtained—a process that would take several months—

each folder would then have to be examined by a professional level employee who would have to extract and compile the information manually. This task would require detailed examination and analysis and would take approximately two to three hours per case.

The cost of completing an effort of this nature in terms of time, manpower and dollars is virtually inestimable, due to the many variables involved not conducive to dependable estimation. Examples of such variables include the number of employees who would need to be transferred from essential work activities (compared to the number of employees who could feasibly *be* spared to work on such a "discovery detail"), the length of time and effort necessary to locate and obtain any given claims folder, and the length of time necessary to extract the relevant information from a given folder. Additionally, manual coordination of such a complex task would be significant. The computerized list of names would have to be distributed to the appropriate locations, and the folders would then have to be forwarded to a central location for collection and tabulation. The disruption of the normal work flow which would be caused by this special review of hundred of files is also inestimable. The further potential disruption of the processing of these and other individual's claims, however slight or unintended, whether at the reconsideration stage or somewhere in the multistage appeals process, would be unavoidable. Many folders would have to be plucked from their rightful places awaiting adjudication or action by whichever offices were holding them at the time they were requested, and processing would be delayed significantly by this process. Conducting a study of the magnitude requested by plaintiffs would thus not only be unduly burdensome to defendant, but it could also be burdensome to some members of plaintiffs' class, as well as to other claimants, by unnecessarily delaying the processing of their claims.

9. How has the reconsideration caseload increased in Vermont in the last five years?

ANSWER TO INTERROGATORY 9

To answer this Interrogatory, defendant has compiled the number of disability and SSI reconsideration cases "cleared" from the SSA computer during fiscal years 1975-1979 (October to October). In addition, the information available for FY 1980 is provided (October to June).

Year	DDI Recons clear	SSI Recons clear
1975	529	323
1976	667	443
1977	514	383
1978	547	406
1979	597	435
Oct-June 1980	439	320

10. What is the present staff of the Vermont Disability Determination Agency, including breakdown by job-title, and how does staffing differ from five years ago?

ANSWER TO INTERROGATORY 10

The chart below sets out the staff positions in the Vermont DDA and the number of employees in each position for fiscal years 1975-79, and October-June 1980.

Vermont staffing categories:

Staffing	1975	1976	1977	1978	1979	Oct-June 1980
Super. (full)	3	1	1	1	1	2
Exam. (full)	6	6	5	4	6	7
Trainee Exam. (full)	1	—	1	1	1	2
Clerical (full)	7	7	7	7	7	5
(part time)	—	—	—	—	—	—
Case Consult. (full)	—	7	1	1	1	—
Admin. Person (full)	3	4	4	5	4	4
Medical Consult (full)	4	—	—	—	—	—
(part time)	—	5	5	4	7	10
Q.A. (full)	—	1	2	3	3	3

Staffing (cont'd)	1975	1976	1977	1978	1979	Oct-June 1980
Vocational (full)	—	—	—	—	—	—
All Other (full)	3	1	—	—	—	—
(part time)	—	1	2	2	1	5
Total Staff (full)	27	27	15	22	27	23
(part time)	—	1	7	6	8	15

11. What is ODO's (or BDI's) and DDA's present budget, and what were they five years ago and in each intervening year?

ANSWER TO INTERROGATORY 11

The charts below indicate the BDI/ODO and Vermont DDA budgets for the past five years.

Vermont DDA Budget:

Year	Budget
1975	$354,023.53
1976	$507,357.52
1977	$508,407.58
1978	$592,292.92
1979	$730,135.78
1980	$750,000.00

ODO Budget for past 5 years:

Fiscal Year 1976	$129,400,000 (BDI)
Fiscal Year 1977	$100,900,000 (BDI)
Fiscal Year 1978	$112,300,000 (BDI)
Fiscal Year 1979	$ 97,700,000 (ODO)
Fiscal Year 1980	$101,900,000 (ODO)

12. In each of the 322 cases cited hereinabove, please indicate in how many was delay in processing contributed to by lost or misplaced files.

13. In each of the 322 cases cited hereinabove, please state all factors that cause cases to:

A. Require "special handling" and be sent to ODO for preparation and release of manual reconsideration notice

B. Fail to have reconsideration notices generated by computer due to systems limitations

14. In each of the 322 cases cited hereinabove, please state the number of cases wherein notice of reconsideration issued from:

A. The DDA
B. The DO
C. ODO
D. Any other source

Objection to Interrogatories 12-14:

See Objection to Interrogatories 1-8 stated *supra.*

15. Please define "special handling" and "systems limitations" as used in answering Second Interrogatory No. 1 (page 3).

ANSWER TO INTERROGATORY 15

"Systems limitations" generally mean that the various computer processes have not been programmed to take the required actions, or some portion of the required information is not available in the computer system. Therefore, the system is precluded, or limited, from completing the required action.

Another type of "systems limitations" is the kind in which specific computer stoppages have been programmed because of complexities or certain case characteristics. Cases appearing to have over-large payments or certain apparently questionable paragraphs in the notice will be rejected by the system and referred to a reviewer for either confirmation or correction.

"Special handling" means human intervention is required. It means review and certification by disability examiners, claims authorizers, and/or benefit authorizers, as necessary and appropriate. These examiners/authorizers determine the correctness of apparently conflicting information, identify or write the correct notice, and compute and authorize payment.

"Special handling" also includes special procedures to expedite the claims material to the examiners/authorizers

and from there to the computer keying facility and typing staffs.

16. Please state the name, title, and address of each individual who contributed to the answer of each one of plaintiffs' Second and Third Interrogatory sets and plaintiffs' Requests for Admissions, specifying which answers said person(s) were responsible for.

ANSWER TO INTERROGATORY 16

Second Interrogatories:

Name	Title	Address
Sherill E. Pierce	Supervisory Social Insurance Program Specialist (Disability)	Social Security Admin. Disability Program Br. Room 1200 John Fitzgerald Kennedy Federal Building Boston, MA 02203
Carmine R. Fuccullo	Social Insurance Program Specialist (Disability)	Social Security Admin. Disability Program Br. Room 1200 John Fitzgerald Kennedy Federal Building Boston, MA 02203
Michael F. Sullivan	Formerly: Social Insurance Program Specialist (Disability) Currently: Supervisory Social Insurance Claims Examiner (Disability)	Social Security Admin. Disability Analysis Br. Room 1634, 100 Summer St. Boston, MA 02110
Donald L. Smith	Social Insurance Program Analyst (Disability)	Social Security Admin. Office of Disability Op. Dickinson Tower T7227 1500 Woodlawn Drive Baltimore, MD 21241

The foregoing individuals made major contributions in gathering and providing information. They also directed and supervised a number of other persons who assisted with the gathering of the data and background information in a clerical capacity, *i.e.*, assisted in the manual review of the data base.

Third Interrogatories 9-11, 15:

Harry Fitzhugh	Litigation Staff	Social Security Admin. OPP Office of Regulations Litigation Staff Room 4319 West High Rise 6401 Security Blvd. Baltimore, MD 21235

Requests for Admissions:

Ted Allen	DDS Administration	103 S. Main Street Waterbury Complex Waterbury, VT 05676

REQUESTS FOR ADMISSIONS

1. Vermont's DDA also makes disability determinations for medicaid claimants.

Response: Admitted.

2. In the State of Vermont, the definition of "disability" is identical for programs under Titles II (disability insurance) and XIX (medicaid) of the Social Security Act.

Response: Admitted.

3. Vermont's Welfare Assistance Manual, § 2423.58b requires initial medicaid disability determinations to be furnished to the applicant within fifty (50) days of date of applications.

Response: Denied. Vermont's Welfare Assistance Manual (WAM) § 2423.518 requires the DDA to complete its action within fifty days unless unusual circumstances apply or delays occur beyond DDA's control. WAM 2121 allows for an additional ten day period for Department of Social Welfare action on the claim. Sixty days is the correct overall time limit from date of application to date of notification of decision.

I have read and reviewed the foregoing Answers to Plaintiffs' Third Set of Interrogatories and they are true to the best of my knowledge and belief.

/s/ Harris Factor
HARRIS FACTOR

Subscribed and sworn to before me this 5th day of September, 1980.

/s/ [Illegible]
Notary Public

My Commission expires: 7/1/82

The foregoing Objections and Answers to Requests for Admissions are made on defendant's behalf by her undersigned attorneys.

Respectfully submitted,

ALICE DANIEL
Assistant Attorney General

WILLIAM B. GRAY
Assistant United States Attorney

/s/ Paul Blankenstein/amg
PAUL BLANKENSTEIN

/s/ Anne M. Gulyassy
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Civil Action No. 78-266

LEON S. DAY and AMEDIE MAURAIS, on behalf of themselves and all others similarly situated, PLAINTIFFS

v.

RICHARD S. SCHWEIKER, Secretary, United States Department of Health and Human Services, DEFENDANT

DECLARATION OF THEODORE S. ALLEN

Theodore S. Allen hereby declares and states as follows:

1. I am the Administrator, Disability Determination Services (DDS), of the Vermont Agency of Human Services. I have been employed as the Administrator since October 1, 1978.

2. The DDS makes medical determinations regarding disability for the Social Security Administration (SSA) for Title II and Title XVI (SSI) claimants at the initial and reconsideration level, for both initial claims for benefits and continuing disability investigations (CDI).

3. Prior to my appointment October 1, 1978, the DDS did not have a full-time, permanent Administrator for over one year. In 1977, the administrator experienced serious health problems and was frequently absent on sick leave until he retired for medical reasons in early 1978. An Acting Administrator was appointed at that time. Because he perceived that he would not be appointed Administrator, the DDS had no effective leadership until I assumed the Administrator's position.

4. In the summer of 1978, the SSA radically changed the quality control standards for Title II and Title XVI

cases and substantially increased the documentation requirements. Without a permanent Administrator, the DDS was particularly ill-equipped to integrate these changes.

5. From my experience in state government and vocational rehabilitation, I was generally familiar with the work performed by the DDS, but I spent my first several months learning about disability determinations, personnel, the organizational structure and the technical aspects of the DDS. In the last two years I have learned how things worked, what the situation was, what needed to be done, and what could be done about it.

6. In November, 1978, one of my first actions was to request additional positions, both for examiners and clerical positions. In January, 1979, I initiated work on ordering word processing equipment which was in place by January, 1980, and fully operative by July, 1980.

7. Prior to my arrival, cases were assigned based on geographical location. The examiners preferred this system, although it resulted in extreme variations in caseload. In August, 1979, we began an equalized caseload distribution system on intake to stabilize the workload and to make case assignment more predictable. Previously, an examiner could have from 20 to 140 cases per month, being assigned at the rate of one every few days or 20 in a single day. Now, examiners can expect a maximum of 7 to 8 cases in one day and can therefore schedule their time more effectively. Further, since cases are assigned in rotation, the caseload is distributed more equally among examiners.

8. In August, 1979, we also instituted a centralized consultative examination (CE) unit. All CE appointments are made and recorded centrally; thus, when there is a cancellation, a claimant whose appointment is several weeks away can be scheduled for that slot. Also, follow-up for CE appointments is now monitored centrally.

9. A telerecorder system installed in October, 1978, never functioned properly. Doctors were frequently un-

knowingly cut off in the middle of dictating their medical reports. DDS then had to request medical reports from the doctors again although the doctors thought they had dictated the reports. This situation seriously damaged our cooperative relationship with the medical community. A new system has been in effect since December, 1979, whereby a private service transcribes dictated reports. It has operated without problem and we are receiving complete medical reports in a more timely fashion.

10. In a number of cases, the DDS will order a consultative examination. Often times DDS has little control over the scheduling or receipt of the doctor's report. In addition, in some cases the need for a CE is not established until late in the reconsideration process, *i.e.*, when the available medical evidence on file and indicated by the claimant is found to be insufficient. Sometimes, even after a reconsideration determination is made, a CE is found to be necessary after quality assurance review at DDS.

11. All reconsideration determinations must be reviewed by the DDS examiner and a physician. All of the doctors work only part-time at DDS and some delay is incurred when completion of the reconsideration must await review by a physician. The orthopedic, neurological, and psychiatric specialists were available only once a week during the time period reflected in the case summaries.

12. After the reconsideration decision has been made, it is subject to quality assurance (QA) review at several levels. In some cases, the reconsideration is returned to DDS by QA for additional documentation. After further development, the case would again go to QA. Prior to 1978, the documentation standards on reconsideration were less rigorous than they are now. DDS has experienced a period of adjustment in revising its review procedures to meet the new documentation standards.

13. One of my first priorities as Administrator was to upgrade and increase the number of examiners at

DDS. As of August 1980, I had approval for and hired three new examiners. In addition, I hired three other employees in clerical positions. Although these new examiners have helped to improve DDS's processing times, a minimum training period of six months to two years was required before reaching peak efficiency.

14. I determined that one DDS employee should be terminated because of unsatisfactory performance. This employee appealed the termination which effectively froze one position for five months. My decision to fire this employee was upheld on May 28, 1980 and the vacant position was filled on August 11, 1980.

15. Several employees have performed at a less than satisfactory level. After warnings regarding their performance, they have improved considerably.

16. I determined that a need existed for a supervisor for the examiners. In December, 1979, I promoted an examiner to supervisor, but consequently lost the services of an excellent examiner. The individual selected for supervisor did quite well, considering that we were still in the process of defining the supervisor's role and training the incumbent during the first year. I have found that the benefit of the functions performed by the supervisor has outweighed the detriment of the loss of an examiner.

17. One significant problem with the termination or promotion of examiners is the difficulty in replacing such employees. The same problem occurs when additional examiner positions are created. It is extremely difficult to find experienced examiners. Generally, examiners are or were employed by state agencies in other states and are unwilling to relocate, particularly if the position available has a limited duration. Thus, there was, and is, a problem in filling examiner positions at DDS.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Theodore S. Allen
THEODORE S. ALLEN
Administrator
Disability Determination Service
Vermont Agency of Human Services

Executed on: Sept. [?], 1981

SOCIAL SECURITY ADMINISTRATION EVALUATIONS

EXHIBIT 18

SOCIAL SECURITY ADMINISTRATION
BOSTON REGION

MEMORANDUM DI 17-1
Date: March 20, 1979
SD-11

TO : Joseph D. Lonergan
Assistant Regional Commissioner
Disability Insurance

FROM : Gerald G. Evans
Program Operations Officer

SUBJECT: Report of a Visit to the Vermont State Agency on March 13 and 14, 1979

I. *Productivity*

1. *Aged Case Lists*

The DDS is presently employing two different methods of monitoring progress on aged cases. One is the bi-weekly aged case report, which lists all cases over 70 days old, what the expected completion date is, and what the last two actions were. These forms are reviewed by the Administrator and the Supervisor in an attempt to assist the examiners with identifying problem areas and adjudicating the cases. In addition, during the past few weeks, the DDS has adopted a policy whereby all cases, as they become 30 days old, are placed on a list and are reviewed by the Deputy Administrator in an attempt to spot cases which, might become 70-day cases. At present, it is too early to tell whether or not this recently-adopted procedure will have a significant impact on the number of 70-day cases.

I have been reviewing the 70 day aged case lists for a number of months and it appears that the main reason for the high percentage of aged cases in Vermont is lack of timely followups and basic inadherence to sound development practices. The Administrator is aware of these deficiencies, and procedures and monitoring devices has been and are continuing to be activated and monitored to give the DDS control over this problem. At present, there has been an increase in the earlier placement of consultative examinations. In the past, numbers of unproductive followups for medical evidence of record to unproductive sources had taken place prior to the placement of the CE exam. Overall, there should not be a significant increase in the percentage of claims needing CE's as most of the CE's would have been ordered albeit at a later date.

2. *Accountability*

By the time this report is read, an employee of the DDS will have received a written warning placing him on probation to meet acceptable standards of production with a 30 and 180-day time frame specifically spelled out. It is anticipated that this written warning and interim rating will have a beneficial effect beyond that one recipient. There are a couple of examiners in the DDS whose morale has suffered because of the fact that poor performing examiners have continued to get help and reduced caseloads while they were expected to pick up the slack. For the other examiners whose performance leaves something to be desired, this will serve as a warning.

3. *Processing Time Goals*

Mr. Allen is in receipt of several issuances from several regions outlining projected targets for cases

within DDS processing. A number of these time goals for the various stages of case management have been adopted such as a ten-day diary for requesting medical evidence of record and only one followup. These have been presented to the examiners and now it appears to be at the point where constant management pressure is necessary to get the examiners to follow these guidelines.

4. *SPAR Returns*

Each month, upon receipt of the list from the CRS showing SPAR returns over 60 days, the Deputy Administrator goes through all of the cases to analyze if appropriate action is being taken to speed these cases along. It appears that slow progress in reducing the number and average age of these SPAR returns has been made and it is anticipated that, in the ensuing months, the problem of severely aged SPAR returns will cease to be a continual problem. It is expected that this will be achieved by constant monitoring of examiner handling of the SPAR returns in terms of quality and timeliness and attempts at training on the issues involved.

5. *Clerical Supervision and Productivity*

The clericals in the DDS have been divided into two reporting units. It is anticipated that this line of reporting will make the productivity of the clericals less subject to variation. In addition, some cross-training of clerical functions is being undertaken so there will be more flexibility in assigning workloads. Basically, one supervisor has six clericals reporting to her and their main functions tend to be in the case processing area. The other supervisor is overseeing the technical assistant, systems, and fiscal functions as well as having the other supervisor report to her.

6. *Fiscal Unit Productivity*

Since the clerical reorganization, the fiscal unit is keeping current with payment of the bills for medical services and is slowly but steadily cutting down on the backlog. At the present time, a portion of the delay in making payments to consulting physicians is due to a backup in the state fiscal unit. The backup, in part, is due to the state fiscal unit being shortstaffed and the fact that, in the past 30 days, the DDS has sent down approximately 1,000 bills for payment.

7. *PPMY and Backlog*

The DDS's past performance since the begining of the current fiscal year in terms of the raw and adjusted PPMY were reviewed and the Administrator is aware that, on an adjusted basis, Vermont is significantly off the regional pace in PPMY. The PPMY was reviewed in terms of the current week's work pending and expected examiner productivity. The ensuing accountability actions directed toward the examiners are expected to produce enough increase in productivity so that during the next eight to twelve weeks, the DDS should be able to significantly whittle away at the cases pending so that it can be brought down to acceptable levels.

II. *Medicaid*

The Department of Social Welfare for whom the Title XIX determinations are made by the DDS, has agreed to pay on a direct billing basis for examiner and physician time at fair hearings. The DDS is carefully logging the examiner and physician expenditure of time to ensure that the energy devoted to Title XIX does not impact on the resources allocated for Titles II and XVI. The Administrator is keeping a close personal watch on this situation.

III. *Equipment*

1. *Telerecorder*

The Dictaphone telerecorder machine issue has still not been satisfactorily resolved. The recently-purchased large capacity Dictaphone machine was causing trouble by cutting off dictating physicians. After extensive bench testing, it was determined that the individual unit under laboratory conditions was performing well. During these tests, the DDS was in receipt of a small capacity loaner machine and, after an initial adjustment, this machine has not cut off any physicians. The drawback, of course, is that it occasionally cannot keep up with the physician input. The local Dictaphone service man has made contact with the factory engineers who will shortly be coming to Vermont to compare and field test various units and compare the factory specifications.

At the present time, it is thought that the new State Dimension phone system is responsible for the trouble. The purchased equipment is highly sensitive and may be encountering difficulties due to extraneous noises and electrical impulses in the phone system. For example, the machine automatically stops recording after a 30-second pause on the part of the dictator and various noises within the phone equipment are thought to be responsible for cutting off. The situation is being monitored.

2. *Word Processing*

There is a temporary holdup within the State for the requested word processing equipment as the State purchasing people believe there is cheaper equipment available which would do the same job. After comparing notes with the IBM representative, a case was made that the cheaper equipment from another company did not have the same random

access and other capabilities that the IBM equipment had. This argument is being presented to the appropriate committee and it is hoped that approval will be given to the State purchasing office to contract for this equipment.

3. *Equipment Performance Records*

The Administrator has given to the Administrative Aid the responsibility of setting up and maintaining the equipment performance records to record downtime on the equipment in the DDS.

IV. *QA Related Activities*

1. *Title XVI Accuracy*

The recent decline in Vermont Title XVI accuracy has been identified and should be improving over the next couple of months. For the period of November, December and January, Vermont received 14 SPAR returns from the Claims Review Section. One examiner had 10 of the 14 returns and 8 of them 10 involved medical vocational allowances. This explains the reason for the much lower allowance rate accuracy. A review of the 1774's indicates that this one examiner has a tendency to make slight impairments into moderate impairments. The corrective action that is to be undertaken is training and awareness for the examiner and 100% of this examiner's medical vocational allowances will be reviewed by the Quality Assurance unit. It is also anticipated that the new vocational regulations requiring RFC's will tend to eliminate, the tendency of excalating the severity of impairment. The Administrator has calculated that, due to the small number of cases reviewed, one SPAR deficiency a month will result in excellent accuracy. Two returns put them at about the regional average and three returns, of course, drops them below the

regional average. At this time, it is hard to measure the impact that the vocational regulations will have on the accuracy during the next couple of months but the factors which have caused the recent decline should be eliminated.

2. *Sample Attainment*

I had targeted sample attainment for one of the activities to be discussed in the DDS because of some recent reports. During my visit, a call was received by the DDS from the Regional Office to check on sample attainment because the second tier sample attainment of both Titles at recon. were significantly off for the 12/78 quarter. The Title II sample attainment in Baltimore was zero and the sample attainment at the CRS was only 43% of the expected yield. A check with the QA unit and clericals assigned to the sample attainment revealed the shortcomings in both areas and they have now been corrected. For some reason, the manual selection of the Title II recon. cases was discontinued due to a misunderstanding of a change in routing procedures. This has been corrected. The Title XVI dropoff was explainable by several clerical changes in the unit responsible for this sample attainment. A review of the January figures indicates that the sample attainment under Title XVI was much better. It was recommended by Carmine Fuccillo that the instructions for sampling be put in writing and maintained by the clericals responsible and in the QA unit. It will be determined which one individual will be assigned the prime responsibility for monitoring the sample attainment process.

> *DDS Action Items: Insure that instructions for the proper sample attainment and selection methods are written down for both titles and assign one person the overall responsibility for monitoring this process.*

3. *Vocational Regulations*

A review of some cases in the QA unit with medical vocational factors involved revealed that the rationale being used is much more extensive than had been present in the past. It is taking the examiner much more time to complete these requirements and the QA examiner revealed that it takes longer to review these cases. No projections are being offered for the length of time that either one of these functions will take once the basic technical material is mastered. It became apparent through discussions with the QA examiners that the residual function capacity forms being completed by the physicians (particularly the consulting physicians) are causing problems because of unfamiliarity with the concept of assessing RFC. There may be a tendency developing for an overall assessment of residual capacity rather than how the impairment by itself effects the residual capacity. These items will be closely monitored and reviewed.

After some discussion, it was suggested that, perhaps, sometime after six or eight weeks goes by, a regional conference on the new vocational regulations as to their implementation, problems, and QA review impact could held.

It was also mentioned that the age of the claimant in those cases where age is critical would be determined as to the age at the time of adjudication rather than the age at the end of the waiting period or the alleged date of onset.

4. *Continuing Disability Investigations*

The statistics for the accuracy rates for medical continuances were reviewed with the Administrator and he is aware of their poor performance in terms of accuracy over a six-month period. This problem

is being addressed by redistributing the CDI workload to more than one examiner and emphasis to the prime CDI examiner that the requirements are to assess the disability as it stands at the time of the CDI rather than looking for medical improvement. It appears that this point has made an improvision and we are expecting improvement. The optimism for improvement is further strengthened by the fact that the upcoming Regional Training session on CDI's should reemphasize this as well as several other problem points.

5. *Overall Accuracy*

A number of reports dealing with the various aspects of Title II and XVI accuracy were reviewed with the Administrator and he expressed the opinion that, in some of the categories, the monthly reports tend to be meaningless in view of the small numbers sampled. He indicated that the quarterly reports tended to be more meaningful but recognized the fact that seeing monthly statistics could give the skilled eye a warning of a developing problem.

V. *Other*

1. *"No Show" CE's*

The DDS is unable to assess the impact of the revised CE letter and pamphlet in the "no show" rate at the present time.

2. *No Account Number Procedures*

The only difficulty continuing to be experienced by the DDS with this new procedures is the inability to input an occasional presumptive disability allowance because of the lack of account number. They are being notified by the District Office on a timely

basis of the account number. I emphasized that, if telephone calls relay the number, the DO's should be reminded to transmit the administrative message as per Regional instructions.

3. *No Decision Case Study*

The DDS had accumulated a backlog batch of no decision case study forms and they have been transmitted to the DDS. They were reminded that these are to be forwarded to the Regional Office on a weekly basis.

4. *District Office Copies of the 831*

The DDS was reminded that, when they are routing the case folder directly to the CES, they should simultaneously forward the DO copy of the 831 to the appropriate office. The DDS was informed in February and appears to be following this practice.

SOCIAL SECURITY ADMINISTRATION
BOSTON REGION

MEMORANDUM

DI 17-7
Date: June 20, 1979
SD-11

TO : Joseph D. Lonergan
Assistant Regional Commissioner
Disability Insurance

FROM : Gerald G. Evans
Program Operations Officer

SUBJECT: Report of a Visit to the Vermont Disability Determination Agency on June 11 and 12, 1979

I. *Productivity and Case Processing Items*

Extensive discussions with the Administrator concerning recent low productivity reveal that the single largest contributing factor is low examiner productivity. The low examiner productivity also manifests itself in the mean processing time for both Titles II and XVI. The Administrator feels that three examiners have been particularly demoralized in the last couple of months due to the high number of CDI cases received by Vermont. As you will recall, they received a much higher proportion of the CDI extension case project than other DDS's.

Up until a couple of months ago, Vermont had been making slow but steady progress in reducing backlogs and this all but came to a halt with the impact of the 160 cases. The aged case list revealed a large bulge which is moving along as a single unit through the measurable time frames. These cases also require a greater number of consultative examinations and this has added to the processing time.

Vermont has approximately 125 consulting physicians on their panel and the placement of C/E's has been running an average of three weeks. In order to cut this time

frame down, the examiners have been told to ask physicians for appointments within two weeks and to settle for one within three weeks. If this cannot be achieved, they are to discuss the case with the supervisor, Mr. John Ford. Contributing to the problem of consultative examinations has been the constant trouble with the telerecorder machine and attempts at repair. During my visit, I was informed that messages from physicians are still being cut off. In fact, one of the transcribers was typing a cutoff report at the time of my question. Hopefully, this problem can be alleviated with a transcription service.

Instructions will be given to the examiners to consider travelling claimants for greater distances to place timely C/E's with physicians who respond with quicker reports. Once the transcription problem is solved, an attempt will be made to weed out slow reporters or slow appointment givers from the panel of C/E physicians. The DDS has been giving out the 11/78 edition of the message from Social Security concerning medical examinations.

The monitoring of aged cases and better case inventory control is being achieved through the recently-adopted master control system. This list is maintained by tally strips which are put in a metal display rack so that the oldest case appears first and subsequent cases thereafter. This list also enables the central control unit to track cases when they are returned from the Quality Assurance unit. This will prevent cases from remaining in the DDS and not being counted. The person who completes the weekly SAOR report also has the responsibility of controlling the master list. This list appears to be working out well and three additional display pages have been ordered.

A recent random sample by the Quality Assurance unit revealed that 27 out of 82 cases or approximately 33% were denials based on medical vocational grounds. The Administrator estimates that the average medical vocational denial is taking the examiners approximately 40

minutes to complete and this is also responsible for slower processing time.

The monitoring of 60-day cases by the district offices in Vermont continues to be an effective means for communicating case delays to the district office. The aged case list prepared by the Vermont DO's at the close of April, 1979 revealed that, at the time the case lists were prepared, nine of the cases had been cleared at the close of April by the DDS and, by the third week in May, approximately one-half of the remaining cases had been cleared. During my visit, the Administrator received a couple of calls from the district offices checking on aged cases.

Progress has been noted on the monthly CRS-prepared list of aged SPAR returns in that the list prepared on June 1 showed only nine claims where the preceding month had 11 and, both of these figures represent a significant decline from a half a year ago. It was also noted that the average age of the returns on this list appears to be better in that very aged SPAR returns are no longer present.

Many methods and potential solutions were discussed along with all the pros and cons as to how greater productivity could be achieved by the examiners and the clericals. One hindering factor is that the State does not have an annual merit pay review nor is their any award system to reward better-than-average performance.

II. *District Office Relations*

The DDS just finished with the visitations for the Rutland, Vermont Claims Representatives and Operations Analyst. The visitations consisted of two groups of three and three groups of two people coming to the DDS for most of the day on Fridays. The orientation consisted of several examiners who work with the Rutland service area showing the Claims Representatives around the vari-

ous functions of the DDS. This encompassed intake, case processing, Q/A, etc., then actually working a couple of cases with them looking on, so that they could see how the input on the 3398 and related documents, have a direct impact on processing time and quality of the product in the DDS.

The benefits of this orientation may be felt in the near future as the DDS will shortly adopt a project which will be performed by the person who does the screening of the new cases. This individual will have a checklist which will be completed when she screens the cases to annotate by Claims Representative, cases that have omissions or errors. When numbers accumulate beyond what is reasonably acceptable, communication will be made with the appropriate person in the district office. It is hoped that this screening project will show the benefit of the recent Rutland exchange.

The Administrator was informed that three DDS's in Network IV will be receiving cases from district offices with the alleged onset date shown on the 831. This item will be added to the screening criteria for the intake clerk.

III. *Fiscal Matters*

The backlog in unpaid medical bills in the DDS has been reduced to normal pipeline buildup. This was accomplished by having approximately two-and-a-half people working in the fiscal unit. The State recently adopted a new voucher for medical services which has twice as much information as before and, this requires the State fiscal unit to keypunch in twice as much data without any additional clerical help. This has caused a backlog of bill payment in the State fiscal unit. The catchup by the DDS fiscal units, which was five months in being accomplished, will now have to be worked off by the State fiscal unit.

It was noted that Vermont's traditionally low C/E rate of approximately 20% has been running close to 30% for the last four to five months. Accordingly, the budget projections that were made back in December or would be somewhat inadequate as the present outlay is running approximately 3,000 a month more than had been projected. These figures were discussed with the budget unit in the regional office and funds were reallocated to cover the increased costs.

On my last visit, the DDS Director requested figures pertaining to time expenditure for various activities in the DDS. I informed him that the regional office was researching this and, in the interim, FAL 162, dated December 27, 1978, dealing with the budgeted workload factor items could be of some assistance. If the Administrator cannot locate this FAL, he will contact us for a photocopy.

IV. *Word Processing*

Ted Allen is completing a draft letter of applications needed in the DDS from word processing equipment and this will be sent to Digital and IBM for their completion and analysis by the Administrator. On Friday, June 15, Ted saw a demonstration of the Digital equipment in Burlington. I left Ted with a copy of pertinent parts of the IBM GSA catalog dealing with the IBM 6/412 information processor and the IBM 6/420 add-on unit which would enable the IBM system to have additional keying capacity without duplicating the entire unit. Progress is being made in the situation and it now appears that the State Systems Committee will permit the DDS to purchase whichever system is felt to be the best buy for the money and purpose in the DDS. The Administrator feels that, perhaps, a visit sometime in July to the Maine DDS where the System 6 should be fully operational would be the final input to make a conclusive decision.

V. *Medical Affairs*

The State Agency Medical Consultant fee schedule for the State fiscal year 1980, has been settled and the rates call for the physicians to receive $42.40 with any first-year signees at the rate of $40 an hour. Over ten years of service will benefit a physician to the sum of $47.40 an hour with the Chief Medical Consultant receiving a $3.00 an hour differential. There are only two physicians with over ten years of service and they generally average three to four hours a week. It is clearly understood that the new contract rate will not permit any travel time to be paid for at all under Titles II or XVI and that all pay is for time actually spent in the DDS.

VI. *SAOR, SAWS and Systems*

The following items are submitted in conjunction with the May 16 visit report on the above-mentioned subject. At the present time, the metal display rack previously mentioned is being used to control the cases in the DDS. Tally strips are kept in chronological order and are not separated by SAOR category. One individual is keeping this master list and the SAOR report is being prepared at the expenditure of one hour of time each week where previously, it took two people approximately ten to eleven hours to produce this report. The SAOR category breakout is not felt to be productive in terms of the manpower necessary to achieve this at the present time.

The reporting of the medical evidence of record purchases received after a case has been cleared is being worked on. At present, the Administrator is trying to develop a system to make this productive in view of the small amount of medical evidence received after the case has been adjudicated. It will be a trade off between the amount of evidence received and the time needed to utilize such a system.

The SPAR returns are now being kept by the source of origin rather than the Title. Items 38, 39 and 40 dealing with informal remands, hearings, and assistance requests are now active and data will be accumulated. Likewise, SSI child referrals will be tabulated on the weekly SAOR report.

The DDS is now reporting concurrent claims clearances in accordance with the SAOR manual, Chapter 3, Section D. Mainly, a concurrent clearance is reported when the last portion of the case has been cleared and the tally of allowances and denials is according to the number of clearances. An adjustment has been made to show an examiner as full time rather than a trainee and Mr. Ford is now counted as a full-time supervisor.

One person is now responsible for compiling the SAOR and SAWS reports and the consistency between those two reports will be ensured. Training has been received to insure that the SAWS collection will be targeted for the specific activity involved rather than case-related activity.

The recommendation to realign the method for counting aged cases so that the DDS should count only those cases pending over 45 or 70-days rather than those at the 45 or 70-day level has not yet been achieved but should be forthcoming to make it consistent with SAOR requirements. All the systems activity, and all the clerical functions now have backups and other people trained for emergency fill-ins. The previous problem with supplies should be shortly eliminated as the DDS has made a follow up call for supplies and was advised to contact district offices and/or other DDS's when immediate supplies are needed.

VII. *Quality Assurance Activities*

At the time of my visit, the case backlog in the Quality Assurance unit was virtually non existent, just barely

providing enough cases for the pipeline. It was mentioned that, for April, the Title II recon sample realization was one case short in receipt from the two selected for sampling. There was a possibility that, due to the mail time and the small number selected for sampling, that the one receipt rather than two was not indicative of any real problem and that the figures should be monitored for several months before a conclusion could be drawn. The Quality Assurance unit regularly compares the statistics for second and third tier review with their own internal statistics and they find that the main problem consistently pertains to documentation while the percentage of deficiencies is lower on the second and third level.

Processing time was also analyzed and the analysts have been citing excessive time for development on the part of individual examiners and making this known to the Administrator. For purposes of the periodic Q/A reports received in the regional office and Baltimore, the functional analysis is broken up among two examiners. One concentrates on the external returns while the other individual analyzes and writes up the internal returns.

The Administrator asked what has transpired with the recommendation of the work group to restructure the sampling requirements for the smaller States so that they would be statistically sound over a three-month, rather than a one-month basis. I mentioned that this recommendation had been made but, at the current time, no resolution had been forthcoming. He recommended this as a potential incentive to smaller states. If their quality statistics were of an acceptable level for a specified period of time, an incentive be to eliminate some special studies or reduce the sampling size. This, of course, would enable the DDS to concentrate the manpower previously consigned to the Q/A activities areas which might be more productive in the DDS.

VIII. *Potential Areas for Improvement*

Considerable time was spent on the pros and cons of changing the case distribution method from a geographic breakdown to a sequential distribution. This would provide a more uniform distribution of cases and provide the built-in flexibility for assignment of additional cases to more productive examiners on a regular basis. The Administrator appeared to realize that this last step was necessary in an attempt to increase production and, in the ensuing weeks, he will devote time to devising a procedure for implementing this in July. Discussions were held with the supervisor and several examiners in an effort to increase individual examiner productivity. One examiner is now in the third month of a six-month trial probation period and conversation was held about the feasibility of serving a similar probation period on another low producing examiner.

MEMORANDUM

DI 17-7
Date: August 10, 1979
SD-11

TO : Joseph D. Lonergan
Assistant Regional Commissioner
Disability Insurance

FROM : Gerald G. Evans
Program Operations Officer

SUBJECT: Report of a Visit to the Vermont Disability Determination Agency on August 1 & 2, 1979

I. *Systems Activities*

1. *Classification*

The Data Transmission Specialist indicated that she felt her job description was in need of updating and reclassification. I informed her that the Regional Office had a model job description which would be forwarded along with some samples from other States. It would then be up to her and the DDS Administrator to rework the job description and process it through the State classification system.

In order to facilitate communications with the Vermont District Offices, a letter is being sent advising the DO's to contact the systems coordinator on systems-related activities and the names of the District Office contacts for systems activities will also be solicited.

2. *Non-Insured Status Alert Project*

The project is proceeding with some of the expected start-up difficulties and one worth mentioning at this point in time concerns the alert on individuals who are insured under the special insured status positions.

3. *Edit Logs*

The edit logs are reviewed daily, weekly, and monthly from an accuracy standpoint and also to insure that the entries are complete. The DDS has received Identical Letter 53-79 and will comply with our request for submission of the edit logs. It has been noticed that most of the edits caused by the district offices are a result of incorrect account numbers submitted by the district offices either into the system or incorrect typing on the 831's from which the DDS transposes data. This has been conveyed to the district offices.

It has been observed in the recent past that there were a number of cases with unusually long processing times at the edit resolution point. Contact with several district offices revealed that certain selected DO clearances were not taking into the system and, likewise, DDS receipt messages were not taking. Contact with the appropriate district offices was instituted with DOS and our systems specialist being made aware of these problems and it appears that they are present to some extent with other States and perhaps other regions. What makes this somewhat unusual is that not only is the system not entering the data but there is no evidence of a rejection. Along these same lines, it has been noticed that, occasionally, SAOR messages are received over the teletype in Boston but not all the time in Baltimore and even on one occasion, the SAOR report was received by Baltimore and not in Boston. Perhaps some of the same systems problems were present with the SAOR difficulties.

II. *Word Processing—Telerecorder—Supplies*

1. *Word Processing*

August 9th is the due date for submission of bids by vendors of word processing equipment according

to DDS listed specifications. The submissions will be evaluated as quickly as possible and the selection made and cleared through the Regional office.

2. *Telerecorder and Transcription Service*

The initial submission for a contract for transcription services was returned by the Secretary of Administration in Vermont as being too costly. The Administrator reworked the proposal to show that the proposed spending amount reflected a doubling of the present amount of transcribed material. In addition, the Administrator was advised that additional points were that greater flexibility in staffing would be taken care of by the contract and that, this would provide better service to the citizens of Vermont and it was hard to place a dollar amount on that.

3. *Supplies*

Vermont has been experiencing difficulty in receiving supplies during the January and June ordering periods. In fact, our office was involved in placing an emergency order for four needed items on May 21st. On follow-up, it was revealed that Baltimore had no record of the request for the Vermont supplies and Vermont was requested to send a memo to Mr. Frank Covert in Baltimore requesting the needed supplies. This was done on July 20, 1979 and I asked senior clerk, Beth Bragg, to diary the memo and inform us if the supplies weren't received.

III. *CDI Extension Project*

The status of the project was reviewed with the Administrator in view of the percentage completed and the new target goal of 95% by August 17th. The Administrator indicated the middle of August would see the com-

pletion of approximately 95% of the cases. A reorganization of the case distribution system and the handling of the CDI by other senior examiners should enable them to make significant progress in the ensuing weeks. Accordingly, the speedy resolution of the CDI cases will show a significant drop in the number of CRS returns outstanding in the DDS over 60 days as a good portion of this aged list is comprised of CDI claims. The fact that this project was to receive top priority was again stressed.

IV. *Productivity-Related Items*

1. *Corrective Action Plans*

Effective with Friday, August 3, 1979, several changes in case processing were instituted and should shortly begin to show positive results. The case distribution system has been changed from that of geographic specialization to a pure rotational assignment. This will allow for a quicker and more equitable distribution among the examiners who can best handle the work and result in shorter processing time. Additionally, this same day will see the inauguration of a centralized CE placement unit handled by a clerical. This individual will place the CE exams, contact the claimants, follow-up with the doctors and perform record-keeping. This will relieve the examiners of some of these clerical-type duties and will permit them to spend more time on case adjudication. It will also allow management greater control over the quality of the CE product and utilization of the better physicians.

In addition, effective with this date, the overtime for Title XIX claims has been discontinued so that the examiners will have more hours of overtime under the Title II and XVI programs.

2. *Poor Productivity*

At the present time, the paperwork to relieve an examiner of his position is being elevated to the State personnel department level to insure all legal processes are being complied with. Additionally, on August 2, 1979, another low producing examiner was given the first step in the process, namely an oral warning to improve productivity. The Administrator will follow up with this individual and take the appropriate actions, if necessary, to terminate employment by entering into the various succeeding stages.

The Deputy Administrator, in lieu of working a partial caseload, is reported to spend significant and regular periods of time with the caseloads of poor producing examiners and taking actions designed to move the cases along.

As an inducement to the examiners, it was decided that, as long as an examiner makes significant progress in reducing their percentage of aged cases, they would not have to submit bi-weekly aged case reports. This will be a requirement for those who do not show progress in reducing their aged cases. It is interesting to note that the examiner who is facing termination had six cases assigned which disappeared and had to be reconstructed. No other examiner during this same time period lost any cases.

3. *Presumptive Disabilities*

Our recent Identical Letter on this subject was emphasized with the Administrator and a couple of examiners as a sure-fire way of reducing Title XVI processing time and benefiting the claimants. The Administrator will emphasize the saving of time for PD's and the Q/A unit will continue to look for

claims that could have been put through this process.

4. *Other Improvements*

A couple of months ago, the Administrator ran a special study on the CE process and instructed the examiners of the various time factors involved and came out with some new procedures designed to speed up the process. Various ways of improving the CE process were discussed and a number of them will be implemented by the centralized CE processes.

It was mentioned that, as soon as the new case distribution and CE systems settled down, consideration should be given to the present system by which cases are diaried for future action. There are no centralized files for cases or followups and individual examiners use different systems. It was recommended that centralized files and the double folder system be utilized. The Administrator will consider these and implement them at the appropriate time if they are felt to be effective.

V. *Q/A Activities*

All of the various Q/A accuracy statistics from the monthly and quarterly standpoint were reviewed, and Vermont continues to perform at an acceptable range of performance.

Several discussions were held on how the quarterly Q.A. reports could be improved and a sample copy from another State was left. The Q/A unit, in their reports continues to be of assistance to management in identifying poor development and untimely actions on the part of the individual examiners.

REVISED CASE SUMMARIES

11, 12, 33, 53

CASE 11 D, F

1.	2/21/79	Recon request filed by claimant
2.	2/22/79	D/O forwarded folder to DDS
3.	2/23/79	DDS read file
4.	2/26/79	DDS ltr requesting medical evidence from Thomas W. Martenis
5.	3/7/79	DDS read medical evidence from Dr. Martenis
6.	3/12/79	DDS reviewed file for severity
7.	3/14/79	DDS unsuccessful phone call to Dr. Martenis
8.	3/16/79	DDS second unsuccessful call to Dr. Martenis
9.	3/19/79	DDS third phone call—Dr. Martenis will send x-ray of hand
10.	3/21/79	DDS read x-ray of hand from Dr. Martenis
11.	3/21/79	DDS examiner signed determination (831)
12.	3/26/79	DDS physician signed 831
13.	4/2/79	DDS input allowance
14.	4/3/79	DDS returned folder to D/O
15.	4/4/79	Run date for payment of allowance

(Revised)

CASE 12 D, Q

1.	2/2/79	D/O telephone interview with claimant
2.	2/7/79	Claimant signed recon reuqest (561)
3.	2/13/79	Recon request (561) read by D/O
4.	2/13/79	D/O forwarded folder to DDS
5.	2/14/79	DDS recd folder
6.	2/22/79	DDS requested evidence from Vermont State Hospital and SSA-401 from claimant
7.	3/22/79	DDS examiner signed recon determination (831)
8.	3/26/79	DDS physician signed recon determination (831) QA-DDS

9.	3/28/79	DDS denial input—date run
10.	3/28/79	DDS forwarded to D/O
11.	4/2/79	Recon denial notice Neither file nor work sheet reflect reason for delay (Revised)

CASE 33 D, I, F, L

1.	7/2/79	Recon filed
2.	7/24/79	SSA-847 (transmittal form) forwarding folder from ODO to DDS
3.	8/7/79	DDS rec folder from ODO
4.	8/7/79	DDS unsuccessful phone call to claimant regarding VA treatment
5.	8/8/79	DDS called claimant again (left message)
6.	8/14/79	DDS prepared ltr to VA for updated Med. evidence but did not send because of no Med. releases
7.	7/21/79	DDS sent Med. releases to claimant for signature
8.	8/22/79	Claimant called DDS regarding last VA treatment
9.	8/29/79	DDS called D/O to obtain Med. releases from claimant
10.	9/6/79	Claimant signed med. releases
11.	9/20/79	DDS examiner signed and physician countersigned determination (833) cessation
12.	9/24/79	DDS forwarded file to ODO
13.	9/26/79	ODO rec folder
14.	10/25/79	Date of recon cessation notice DDS did not obtain any evidence from the VA on recon (Revised)

CASE 53 B, F, Q

1.	2/23/79	Filed for reconsideration; also furnished SSA-3441 "Recon. disability rept." Furnished a copy of rept. from Dr. Alan Rubin and V. R. letter to him stating their services wouldn't help in allowing him to return to work. Also furnished ltr from Richard L. Sortell regarding 8 days of work he had performed. Mr. Sortelle is Pres. of Comm. Services
2.	3/19/79	File to DDS from ODO (for a QA review of initial determination)
3.	3/20/79	File rec'd in DDS
4.	3/22/79	Requested rept. from Dr. Edwards
5.	3/22/79	Voc. form to claimant
6.	4/9/79	Vocation report (SSA-3369)
7.	6/6/79	DO called DDS recon. and was told case still pending
8.	6/7/79	Follow up phone call to Dr. Edwards
9.	6/15/79	Rept. rec'd dated 5/29/79 from Dr. John R. Edwards
10.	6/18/79	Determination signed by examiner and DDS MD. Denial affirmed
11.	7/10/79	DO called DDS re recon. and was told case still pending
12.	7/24/79	DDS input-denial CAPS run same date However, DDS sent denial ltr to claimant and cc to Mr. Sortelle (social worker)
13.	7/24/79	Case ret'd to DO

(Revised)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Civil Action No. 78-266

LEON S. DAY and AMEDIE MAURAIS on behalf of themselves and all others similarly situated, PLAINTIFFS

v.

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT

DEFENDANT'S PLAN FOR IMPLEMENTING THE COURT'S JUDGMENT OF NOVEMBER 6, 1981

Pursuant to paragraph 12 of the Judgment Order filed November 6, 1981, the defendant hereby submits his plan for implementing the relief required therein. Defendant's plan calls for each of the offices identified below to take certain administrative steps as follows:

A. *The Vermont Disability Determination Service (DDS)*

1. Upon receipt of a request for reconsideration, the intake clerk will examine the request to ascertain if the claimant is a resident of Vermont and if the claim is a Title II disability case covered by the *Day* Court Order.

2. If under the Court Order, the intake clerk will attach a Day Court Order flag (Attached hereto) to the folder, complete the DDS identifying data at the top of the flag and annotate part A1 of the flag with the date of the request for reconsideration and the 90 and 180 day dates.

3. If the claim is not under the Court Order, a flag will not be attached and the case will be handled per standard manual instructions.

4. When an examiner receives a flagged folder, the claim will be reviewed to determine whether or not an exception to the Court Order is present. If an exception

is present, or occurs during case processing, part A2 on the flag will be completed, and the case handled per standard manual instructions.

5. If a 90 or 180 day violation should occur while the folder is in the DDS, the examiner will annotate part A3 on the flag and notify the DDS Day Court Order Coordinator.

6. The DDS Day Court Order Coordinator will notify the Montpelier, Vermont District Office of any case for which an interim payment is required. Written confirmation will be forwarded to the district office the same day.

7. The Montpelier District Office manager will be responsible for certifying payment and keying into the SSA computer system the necessary information to effectuate payment. The Montpelier District Office Manager will also forward a notice to the claimant which should arrive at approximately the time of the first payment.

8. The DDS will forward to the SSA Regional Office, each month, a list of all reconsideration cases not excepted from the Day Court Order, that have been pending in the DDS over 70 days. The list will include the date the reconsideration was filed, and the current status.

B. *Office of Hearings and Appeals*

1. Upon receipt of a request for hearing (Form HA-501) in the Manchester, New Hampshire Hearing Office, the docket clerk will examine the request to ascertain if the claimant is a resident of the State of Vermont and if the claim is a Title II case covered by the *Day* Court Order.

2. If the claim is not covered by the *Day* Court Order, the request will be processed in order of receipt (unless applicable to the *Barnett* Court Order).

3. If the claim is covered by the *Day* Court Order, the docket clerk will assign the case to an Administrative Law Judge who will acknowledge receipt of the request

for hearing. If not already done so, a copy of the special notice concerning State of Vermont residents will be sent to the claimant. The Hearing Office will also annotate part B1 of the Day Court Order flag with the date of the request for hearing and the 90 and 180 day dates.

4. If an exception to the Court Order occurs, part B2 of the flag will be completed. If a 90 or 180 day violation occurs, part B3 of the flag will be completed.

5. The Administrative Law Judge in Charge (ALJIC) is responsible for notifying the Montpelier, Vermont District Office each month by telephone of any cases for which interim payment is required. Written confirmation will be sent on the same working day the telephone call is made.

6. The Montpelier District Office Manager will be responsible for certifying payment and keying into the SSA computer system the necessary information to effectuate payment. The Montpelier District Office Manager will also forward a notice to the claimant which should arrive at approximately the time of the first payment.

7. The Regional Chief Administrative Law Judge (RCALJ) is to prepare a written bi-weekly report to the Chief Administrative Law Judge (CALJ) which lists chronologically by date of the request for hearing all cases reported by the ALJIG. The report shall indicate the claimant's name, account number, and current status of case.

8. Special efforts will be required of the ALJIC to insure that claim folders are obtained for Vermont cases within 30 days after the request for hearing is filed. The Regional Commissioner's Office will be contacted whenever a claim file is not received within 15 days after the request for hearing date.

C. *Office of Assessment/Disability Analysis Branch (DAB)*

1. When a Title II reconsideration claim, not excepted from the *Day* Court Order, is forwarded to the DAB in

Boston or Central Office for effectuation of pre-effectuation review (PER), the DDS will annotate the PER flag with, "Day Court Order case—please expedite—See Control Flag Enclosed".

2. On a monthly basis the DDS Court Order Coordinator will furnish the Regional Office Coordinator with a list of all cases under the court Order forwarded to either Baltimore or Boston for processing.

3. The Regional Office Coordinator will control all cases under the court Order that are sent to Boston or Baltimore for review or effectuation, and contact the Montpelier, Vermont District Office if any case requires an interim payment.

D. *SSA District Offices*

1. Upon receipt of a request for a reconsideration or hearing by a Title II only disability claimant who resides in Vermont, field offices will be prepared to provide written notice on the provisions of the *Day* case. They will also be responsible for alerting the processing service centers when the *Day* Order applies to reconsideration cases within their adjudicative responsibilities. In addition, where the district office has adjudicative responsibility, they will refer cases for payment, where DDS has made a disability decision within 180 days, but no systems processing of the decision notice has occurred.

2. Upon notification of a violation by the Vermont DDS, Manchester Office of Hearings and Appeals, an SSA District Office or the Boston Regional Office, the Montpelier Vermont District Office will be prepared to certify payment of Title II benefits for the month of violation. They will also forward a notice to the claimant concerning the payment of interim benefits. The letter will indicate how the violation occurred, when payments will commence and when they will stop, and will also discuss the possibility of overpayment.

3. Upon appropriate notification by Vermont DDS, Manchester Office of Hearings and Appeals, an SSA Dis-

trict Office, or the Boston Regional Office, the Montpelier Vermont District Office will stop payment of interim benefits.

DATED at Rutland, in the District of Vermont, this 31st day of December, 1981.

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DAY C[illegible]NT ORDER CONTROL SHEET

CLAIMANT NAME:

SSN:

CLAIM TYPE:

HEARING TYPE:

ASSIGNED TO ALJ:

A. RECONSIDERATION - To Be Completed by DDS

1. DATE OF REQUEST FOR RECONSIDERATION	90-DAY DUE DATE	180-DAY DUE DATE

2. Claim Excepted from Court Order

EXEMPTION APPLICABLE: (See other side) Circle One: A B C D E

EXPLANATION:

3. DATE RECONSIDERATION DETERMINATION ISSUED:

VIOLATION OF 90-DAY DUE DATE:

VIOLATION OF 180-DAY DUE DATE:

PAYMENT

Date DO Notified of Violation _____

Date Copy of E/R Sent to DO _____

Date DO Notified of Issuance of Determination _____

B. HEARING - To Be Completed by Hearing Office

1. DATE OF REQUEST FOR HEARING	90-DAY DUE DATE	180-DAY DUE DATE

2. EXEMPTION APPLICABLE (See other side) Circle One: A B C D

EXPLANATION:

3. DATE HEARING HELD

	90-Day Violation	OR	180-Day Violation
Date DO Notified of Violation			
Date Copy of E/R Sent to DO			
Date DO Notified that Hearing Held			

001

EXEMPTIONS APPLICABLE AT RECONSIDERATION LEVEL

(A) The claimant offers new medical evidence or reports new medical or reports new medical [sic] treatment since his initial determination;

(B) The claimant agrees to undergo a consultative examination when one is suggested by the defendant;

(C) The claimant or his representative causes a delay by failing to provide information needed for reconsideration;

(D) The claimant or his representative requests a delay; or

(E) The delay is in some other way attributable to the aggrieved claimant or his representative.

EXEMPTIONS APPLICABLE AT HEARING LEVEL

(A) The claimant or his representative causes a delay by failing to provide information needed for adjudication;

(B) The claimant or his representative requests a delay;

(C) The claimant or his representative fails to appear for the scheduled hearing;

(D) The delay is in some other way attributable to the claimant or his representative.

AN IMPORTANT NOTICE CONCERNING YOUR RECONSIDERATION REQUEST

On November 6, 1981 a decision was issued by U.S. District Court Judge James Holden in the case of *Day* v. *Schweiker*. He ordered that the Social Security Administration must issue a decision on your reconsideration request within 180 days of your request for a reconsideration. The court's decision applies to all reconsideration requests filed 12/30/81 or later.

This requirement will not apply if any of the following events occur during the development of your reconsideration:

1. You or your representative offers new medical evidence or reports new medical treatment
2. You agree to undergo a consultative examination when one is suggested by Social Security
3. You or your representative cause a delay by failing to provide information necessary for deciding your case
4. You or your representative request a delay
5. The delay is in some other way caused by you or your representative

If none of the above exceptions apply in your case, and the Social Security Administration has not made a decision on your reconsideration request within 180 days, Social Security must begin paying your interim disability benefits in the first month after the month in which the 180 days time limit is reached.

These benefits will end in the month that a reconsideration decision is made unless the decision is favorable to you. If the decision is favorable, you may continue to receive payments. If the decision is unfavorable, payments will stop, and all prior payments you had received under the court order would be considered overpayments. You would be required to reimburse the Social Security Administration for the total amount of all such overpayments.

AN IMPORTANT NOTICE CONCERNING YOUR HEARING REQUEST

On November 6, 1981 a decision was issued by U.S. District Court Judge James Holden in the case of *Day* v. *Schweiker*. He ordered that an Administrative Law Judge must hold a hearing in your case within 90 days of the date you filed the request for hearing. This requirement does not apply if any of the following events occur during the preparation of your case for hearing:

1) You or your representative cause a delay by failing to provide information needed for deciding your case;

2) You or your representative request a delay;

3) You or your representative fail to appear for the scheduled hearing;

4) The delay is in some other way caused by you or your representative.

The Judge also ordered that the hearing must be held within 180 days of your request for reconsideration of the denial of your claim for benefits, provided that your reconsideration request was made on or after December 30, 1981. In calculating whether or not 180 days has passed since your request for reconsideration, the number of days between the date of the decision on your reconsideration request and the date the Social Security Administration receives your written hearing request will not be counted. The 180 day requirement does not apply if any of the following events occurred during Social Security's consideration of *your* reconsideration request:

1) You or your representative offered new medical evidence or reported new medical treatment;

2) You agreed to undergo a consultative examination when one was suggested by Social Security;

3) You or your representative caused a delay by failing to provide information necessary for deciding your case;

4) You or your representative requested a delay;

5) A delay was in some other way caused by you or your representative.

If none of the appropriate exceptions apply and the Administrative Law Judge has not held a hearing within 90 days of your hearing request and within 180 days of your request for a reconsideration of the denial of your claim for benefits, Social Security must begin paying you interim disability benefits in the first month after the month in which the hearing should have been held. These benefits will end in the month in which the hearing is held. If the final hearing decision is favorable to you, your payments may be reinstated. If the decision is unfavorable, payments you received in the past would be considered overpayments. You would be required to reimburse the Social Security Administration for the total amount of all such overpayments.

SUPREME COURT OF THE UNITED STATES

No. 82-1371

SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

LEON S. DAY, ET AL.

ORDER ALLOWING CERTIORARI

Filed April 25, 1983

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 411891 47

Office-Supreme Court, U.S.
FILED
APR 25
ALEXANDER L. STEVAS,
CLERK

No. 82-1371

In the Supreme Court of the United States

OCTOBER TERM, 1982

SECRETARY OF HEALTH AND HUMAN SERVICES,
PETITIONER

v.

LEON S. DAY, ET AL.,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

The Respondents restate the Questions Presented by the Petitioner more narrowly, as follows:

1. Whether, upon the factual record before them, the courts below erred in concluding that unduly lengthy, unexplainable, non-claimant caused delays experienced in obtaining administrative appellate action by those seeking to acquire or retain Security disability insurance benefits violated the claimants' statutory right to "reasonable notice and opportunity for a hearing," 42 U.S.C. § 405(b).

2. Whether, upon finding clear violations of 42 U.S.C. § 405(b) based upon the undisputed factual record, the courts below exceeded or abused their powers in imposing reasonable limits with explicit exceptions upon administrative appellate actions, and in providing for a recoupable, prospective payment sanction in favor of wronged claimants to insure compliance with the order.

TABLE OF CONTENTS

	Page
Statement of the Case	2
Summary of Argument	8
Argument	
I. There is no dispute among the courts of appeals as to either the meaning of § 205(b) of the Social Security Act or the power of a court to discern violations of the statute upon the facts before it	9
II. The courts of appeals uniformly recognize their obligation to remedy violations of § 205(b) of the Social Security Act	14
III. The unique record in this case and ongoing administrative and legislative developments mitigate against Supreme Court involvement to settle the issues resolved below	21
Conclusion	25
Appendix A	26

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House Comm. on Ways and Means, Report on the Disability Amendments of 1982, No. 97-588, 97th Cong., 2d Sess. 20 (1982) 23

House Comm. on Ways and Means, Subcomm. on Social Security, Status of the Disability Insurance Program, WMCP 97-3, 97th Cong., 1st. Sess. App. C (1981) 23

Social Security Appeals and Case Review Process: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means, Serial 97-31, 97th Cong., 1st Sess. 18, 21 (Oct. 23, 28, 1981) 23

S. Rep. 97-648, 97th Cong., 2d Sess. 6 (1982) 5

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Sen. Comm. on Governmental Affairs, 97th Cong., 2d Sess. Oversight of the Social Security Administration Disability Reviews (Comm. Print Aug. 1982) 7

128 Cong. Rec. 13860 (daily ed. Dec. 3, 1982) (remarks of Sen. Dole) 24

Pres. Doc. re: Hiring Freeze, 46 Fed. Reg. 9907 (Jan. 30, 1981) 6

Program Operations Manual System (POMS) § E2820 (March, 1981) 5

Social Security Rulings, SSR 82-49c (1982) 6

SSA Program Circular No. 08-81-ODP SSA Pub. No. 64-004 (Apr. 27, 1981) 5

Bloch, *Representation and Advocacy at Nonadversary Hearings: The Need of Nonadversary Representatives of Social Security Disability Hearings*, 59 Wash. Univ. Q. 349 (1981) 7

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1371

SECRETARY OF HEALTH AND HUMAN SERVICES,
PETITIONER

v.

LEON S. DAY, ET AL.,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondent Leon S. Day and Amedie Maurais, on behalf of themselves and all others similarly situated, respectfully request that this Court deny the petition for a writ of certiorari seeking review of the Second Circuit's judgment in this case, as reported at 685 F. 2d 19.

STATEMENT OF THE CASE

The instant case concerns unduly lengthy delays incurred by Vermont claimants in obtaining administrative appellate action within the disability insurance benefits (DIB's) program created under Title II of the Social Security Act, as amended. 70 Stat. 815, 42 U.S.C. § 423(a). Section 205(b) of the Act is the statutory basis of the administrative appellate rights that were found to have been denied below. The heart of § 205(b) is the guaranty of "reasonable notice and opportunity for a hearing."[1] 42 U.S.C. § 405(b).

While the Petitioner's (Background) Statement provides a general overview of evolving Social Security Administration (SSA) appeal statistics, Pet. at 3-6, it makes no mention of the factual record considered by the courts below. Yet in enjoining unreasonable delays at both the reconsideration and hearing phases of the administrative appeals process, the district court carefully considered detailed data outlining minute aspects of the inner-workings of both the Vermont Disability Determination Agency (DDA)[2] and the Office of Hearings and Appeals (OHA) that covers the State of Vermont. Indeed, this factual development was crucial to the outcome of the case below.

Named plaintiff Leon S. Day had been disabled for two years when the Secretary concluded that his disability had ceased and terminated the DIB's received by him and his four dependents. This represented about 2/3's of

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[1] An examination of the Act reveals that petitioner errs in stating that Congress helped devise the "four-level system of administrative consideration of disability claims." It was the agency alone, acting under its authority to promulgate regulations, that added the initial appellate step of "reconsideration", and the final post-hearing step of "appeals council review." Each step must be exhausted before individual claims can be judicially reviewed. See Petition (hereinafter, Pet.) at 3-4.

[2] The DDA is the state agency that performs both initial and reconsidered disability determinations for SSA in Vermont, pursuant to 42 U.S.C. § 421.

their monthly income. (C.A. App. 7a and 10a) Mr. Day requested reconsideration and received an unfavorable reconsideration determination only after some 167 days had passed. A subsequent hearing request resulted in a hearing 173 days later (about 2 H weeks after this lawsuit was commenced.) (Pet. at 7) Thus, Mr. Day waited 340 days to obtain a hearing after initiating his appeal. However, nothing he did caused the delays. For example, though the hearing request was instituted promptly, the SSA district office erroneously held his file for two months, in direct violation of the Secretary's procedure. (C.A. App. 46a and 36a). The delays experienced by intervenor Amedie Maurais - 280 days to hearing from initiation of appeal - were similar. (Pet. at 7) Similar, too, were the consequences of delay. In Mr. Day's case, for example, the family accumulated large debts and was forced to move (C.A. App. 8a, 11a). Yet both named plaintiffs ultimately prevailed in reversing the cessation determinations and regaining their lost benefits. (Pet. App. D at 14a; C.A. App. 288a).

The classwide factual record proved the experiences of Day and Maurais to be typical of the problems besetting Vermont disability claimants. With regard to reconsiderations, the district court learned, *inter alia*, that their annual number remained largely constant from year to year while DDA staffing and budget showed marked annual increase (C.A. App. 294a - 295a); that between October 1, 1977 and January 31, 1980, only 454 reconsideration requests were processed (C.A. App. 96a - 97a); that a number of cases took well over a year to "reconsider" (C.A. App. 69a); that the trend in mean processing time was steadily escalating (C.A. App. 96a), though the Secretary had projected a decrease (C.A. App. 40a); that 35% of a random sample of 77 case summaries[3] had not been processed within 90 days[4] (Pet. App. E at 28a; C.A.

[3] The Secretary conceded to the district judge that this data was "representative of the reconsideration process." (Pet. App. E at 26a, n. 6.)

[4] In continuing disability investigation (CDI) cases, in which those found no longer disabled lose their benefits, fully 50% had not been processed within 120 days.

App. 98a, 141a - 171a); that in innumerable cases there were vast gaps of unexplained delay, often at several stages of the reconsideration process in the same case, with claimant-caused delay virtually non-existent[5] (C.A. App. 183a - 289a); and that over one quarter of the cases in Vermont's region were reversed upon reconsideration, in favor of claimants (C.A. App. 42a). The district court concluded that "...when the *explained* delays in the case summaries are subtracted, most, if not all, of the cases could have been completed within 90 days." (emphasis in original) (Pet. App. E at 28a).

As to procedures governing the scheduling of hearings in Vermont, the trial court learned that the Secretary utilized only three administrative law judges (ALJ's), exactly what she had projected as needed (C.A. App. 38a); that the Vermont caseloads were significantly below national goals set for ALJ dispositions (C.A. App. 36a, 38a; Pet. at 5); that only 342 hearings were requested and 233 held between January 1977 and December 15, 1978 (C.A. App. 35a - 36a); that the Secretary had a *stated policy* to schedule all Vermont hearings within 90 days[6] (C.A. App. 39a, 41a), which goal she was not meeting in well over 50% of the Title II cases (C A. App. 53a - 57a); that the delays were marked by non-claimant caused error, sometimes for reasons contravening SSA regulation or policy (C.A. App. 36a and 46a); and that hearing decisions ultimately reversed determinations adverse to Vermont claimants in a remarkable 56.2% of Title II

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[5] DDA failures to obtain or review medical evidence, to generate notices, or to coordinate with other components of the system (such as properly moving files), as well as specific systems "limitations" or other failures, proved to be the main causes of delay (C.A. App. 183a - 266a). These factors were well recognized by the district court. (Pet. App. E at 25a)

[6] When the instant case began, the Secretary was then (and is) under the mandate of the 90 day-to-hearing order of *Barnett v. Califano*, 580 F.2d 28 (2d Cir. 1978) for SSI cases in Vermont. However, the Secretary evinced no procedural difficulty in fully complying with the order. Indeed, we have been told that only two failures to comply with the judicial deadlines have ever occurred in Vermont.

cases (comparable figures were 55.1% for the region and 56.1% nationwide).[7] (C.A. App. 42a).

With its limited emphasis upon national data alone, the Petition at 5 - 6 stresses escalating numbers of appeal requests. Notwithstanding increases in the ALJ corps, support staff and case efficiency, the Petition implies that lengthy delays are inevitable. A large part of the blame is said to be the 1980 legislative requirement[8] that CDI cases be periodically reviewed, which "... predictably will result in an increase in the number of recipients whose benefits are terminated and who subsequently request reconsideration and an ALJ hearing." (Pet. at 4). Yet as Petitioner later concedes, this very requirement was relaxed by Congress in 1982 to afford "... the Secretary flexibility in selecting cases for periodic review in order to enable him to accomodate the backlog of new applications and state staffing levels."[9] (Pet. at 20). Similarly, no mention is made of the Secretary's early 1981 decision "... to review as many cases as possible...[without] waiting for the periodic review provision of the new law to become effective."[10] SSA Program Circular No. 08-81-ODP, SSA Pub. No. 64-004 (April 27, 1981); see also Program Operations Manual System (POMS) § E 2820, *Accelerated Release of Unscheduled Title II CDI's* (March, 1981). Thus, the Secretary selected over 30,000 additional CDI cases for monthly review beginning in March, 1981, solely based upon the agency's discretionary decision to do so.[11]

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[7] The latter figure has now risen to an even more astounding 65%. S. Rep. 97-648, 97th Cong., 2d Sess. (1982) at 6.

[8] 42 U.S.C. § 421(i); see n. 10, *infra*.

[9] Pub. L. No. 97-455, §3, 96 Stat. 2499 (1982). *See*, discussion, infra, at 24-25.

[10] Sections 304(a) and 311 (a) of the Social Security Disability Amendments of 1980, Pub. L. No. 96-265, 94 Stat. 457, in amending § 211(i) of the Act, provided that the periodic review requirement was to commence in January, 1982.

[11] In FY 1982, 506,000 cases were reviewed; in FY 1983, SSA plans to review 640,000. Sen. Comm. on Finance, Staff Data and Materials Related to the Social Security Disability Insurance Program, No. 16, 97th Cong., 2d Sess. 52-53 (1982).

Likewise, other discretionary policy decisions[12] on the national level have exacerbated the problem of hearing delay. These include repeated decisions to freeze the hiring of new ALJ's and staff throughout much of the last two years;[13] official policies encouraging state disability agencies and ALJ's to disregard judicial precedent;[14] establishment of quota systems for individual ALJs creating maximum acceptable percentages of cases that may be decided in favor of claimants;[15] and failure to curtail hearing requests by insuring proper workup by state disability agencies that often obtain information inadequate to properly dispose of cases at initial and

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[12] Respondents do not suggest that the Secretary lacks discretion in administering the Social Security disability program (so long as statutory and constitutional requirements are complied with). Rather, they note simply that discretionary policy decisions have had a foreseeable impact upon the statutory right to reasonably prompt appellate action, while little concomitant effort has been made to address that negative impact.

[13] *See, e.g.*, Pres. Doc. re: Hiring Freeze, 46 Fed. Reg. 9907; both the President and the Secretary have imposed freezes.

[14] This is accomplished either through issuance of non-regulation Social Security Rulings (SSR's) of "non-acquiescence" to federal court decisions or failure to publish regulations implementing appeals court decisions. The resulting lack of uniformity in decision-making causes numerous remands from the federal courts and contributes to the backlog of cases. These policies are challenged in pending litigation such as *Rivera v. Schweiker*, No. 82-3331 (D.N.J., filed as class action, Oct. 7, 1982) and *Lopez v. Schweiker*, No. 82-5322 AWT (C.D.Ca., filed as nationwide class action, Dec. 29, 1982). In *Chee v. Schweiker*, Civ. 82-693-PCT-VAC (D.Az. Dec. 15, 1982), the court voided SSR 82-49c.

[15] This policy is the subject of a recent lawsuit brought against the Secretary by her own ALJ's. *Association of Administrative Law Judges, Inc. v. Schweiker*, C.A. No. 83-0124 (D.D.C., motion to dismiss as to HHS defendants denied, Mar. 14, 1983).

reconsideration levels.[16] In any event, it seems clear that congressional mandates or increasing caseload volume do not completely explain the pressures upon the Secretary alleged in the Petition.

The courts below rejected all the Secretary's arguments seeking to justify unduly lengthy delay. Finding that hearing delays in Vermont violated § 205(b) of the Act, Pet. App. D, and some two years later finding that reconsideration delays did as well, Pet. App. E, the district judge enforced the claimants' statutory rights by imposing deadlines to complete reconsiderations and to schedule hearings that were well within the Secretary's capabilities.[17] Most significantly, the court *excepted* from its time limitations all those cases wherein delay is "... caused at the claimant's instance or where the delay is assignable to the claimant's contention that changed circumstances mandate reconsideration of additional evidence." Pet. App. E at 30a. These exceptions were drafted in careful detail, Pet. App. F at 33a - 34a, and convinced the court of appeals that "... the relief ordered was crafted with an eye toward the Secretary's concerns," including the need "... to assure accurate results."[18] Pet. App. A at 8a. Finally, to insure SSA compliance with its order (and not incidentally, to prevent irreparable injury to wronged claimants), the district court drew upon its equitable powers to provide for a recoupable, prospective interim payment sanction in

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[16] See, Bloch, *Representation and Advocacy at Nonadversary Hearing: The Need for Nonadversary Representatives at Social Security Disability Hearings*, 59 Wash. Univ. Q. 349 (1981); Senate Comm. on Governmental Affairs, 97th Cong. 2d Sess. Oversight of the Social Security Administration Disability Reviews, (Comm. Print Aug. 1982).

[17] The court vested the Secretary with maximum flexibility by leaving ALJs unlimited post-hearing time to fully develop issues. Pet. App. D at 19a. But the processing times themselves were chosen based upon a capacity that was both acknowledged by the Secretary and clearcut from the factual record.

[18] The exceptions responded directly to the Secretary's professed concern that lack of claimant cooperation and medical information were the primary causes of delay. C.A. App. 40a.

favor of claimants who continued to suffer illegal unreasonable delay. Indeed, although the outer-bound of a routine reconsideration processing was found to be 90 days, the trial court disallowed interim relief until the passage of 180 days, being "... persuaded that this solution most appropriately balances the administrative difficulties in implementing this order and the financial needs of deserving claimants." Pet. App. E at 31a. The court of appeals affirmed in all respects.

SUMMARY OF ARGUMENT

Section 205(b) of the Social Security Act provides Respondents and all other persons seeking Social Security disability insurance benefits the right to administrative appellate action including "reasonable notice and opportunity for a hearing." 42 U.S.C. §405(b). The court below, like every other court of appeals that has considered the issue, found the statute to guaranty the right to a hearing within a reasonable time. *White v. Mathews*, 559 F. 2d 852, 858 (2d Cir. 1977), *cert. denied*, 435 U.S. 908; *Caswell v. Califano*, 583 F. 2d 9, 16 (1st Cir. 1978); *Blankenship v. Sec'y of HEW*, 587 F. 2d 329, 334 (6th Cir. 1978); *Wright v. Mathews*, 587 F. 2d 345, 351 (7th Cir. 1978).

The court below, on the extensive Vermont factual record, found routine lengthy delays in appellate action that were solely attributable to the Secretary and contrary to her own policies. Like every other court of appeals confronting a similar factual record, the court concluded that the Secretary was in breach of her duties owed to disabled persons under § 205(b) of the Act. *See, e.g., White, supra* at 858-59; *Caswell, supra* at 15; *Blankenship, supra* at 334. Although the *Wright* case found no violation of § 205(b), the Seventh Circuit's decision is distinguishable due to the different "nature of the particular [i.e. old age and survivor's but not disability] benefits" and the failure of the plaintiffs therein to demonstrate that the Secretary was responsible for the delays. 587 F.2d at 350,n.5,356,353; cf, *Mathews v. Eldridge*, 424 U.S. 319; *California Department of Human Resources v. Java*, 402 U.S. 121.

Each court of appeals that has found violations of § 205(b) has imposed a remedy. The court below followed the majority (First and Second Circuit) rule in imposing time limits, with liberal exceptions to insure accurate and thorough decision-making and to prevent overburdening the Secretary. The *Blankenship* approach differs only insofar as the Sixth Circuit ordered the Secretary to adopt appeal processing time limits by regulations. Significantly, the Sixth Circuit's order has been resisted by the Secretary for five years and has not prevented continuing violations of § 205(b).

Choice of remedy to cure present statutory breaches is a basic judicial function grounded in the broad sweep of equitable powers. *See, e.g., Califano v. Yamasaki*, 442 U.S. 682; *Hutto v. Finney*, 437 U.S. 678; *Hecht v. Bowles*, 321 U.S. 321. The order below, to enforce § 205(b), is inconsistent with no judicial or statutory authority.

Nationwide claims of administrative burden raised by the Secretary only upon appeal are both dubious and unrelated to the instant case. The court below ruled based upon the Vermont record before it and found the Secretary's problems to be of her own making.

Even on a national level, the Secretary has repeatedly taken actions that have exacerbated § 205(b) problems. Erroneous representations to Congress have prevented the commitment of available resources. Recently, however, Congress has become increasingly aware of the delay problem and present legislative activity mitigates against any action by this Court.

ARGUMENT

I. THERE IS NO DISPUTE AMONG THE COURTS OF APPEALS AS TO EITHER THE MEANING OF §205(b) OF THE SOCIAL SECURITY ACT OR THE POWER OF A COURT TO DISCERN VIOLATIONS OF THE STATUTE UPON THE FACTS BEFORE IT.

(A) Section 205(b) of the Social Security Act states that aggrieved claimants and recipients seeking benefits are

entitled to "reasonable notice and opportunity for a hearing." 42 U.S.C. § 405(b). This statutory requirement has been interpreted by four circuit courts of appeals. Each has reached an identical conclusion as to the meaning of the statute.

The Second Circuit, in *White v. Mathews*, 559 F.2d 852 (2nd Cir. 1977), *cert. denied*, 435 U.S. 908 (1978), was first to address the question. The court read § 205(b) "... as giving the claimant a right to a hearing within a reasonable time and we do not understand the Secretary to dispute this construction." 559 F.2d at 858. This interpretation of the statute has been followed in a line of Second Circuit opinions that have rejected every conceivable argument of the Secretary, *i.e.*, *Barnett*, *supra*, and *Sharpe v. Harris*, 621 F.2d 530 (2d Cir. 1980), culminating in the instant case, Pet. App. A at 3a, n.3 (wherein, still, "the Secretary does not challenge this interpretation.")

Identical conclusions of law have since been reached by the First, Sixth, and Seventh Circuits. Thus, *Caswell v. Califano*, 583 F.2d 9, 16 (1st Cir. 1978) ("right to a hearing within a reasonable time") and *Blankenship v. Secretary of HEW*, 587 F.2d 329, 334 (6th Cir. 1978) ("the Secretary has a duty to provide a hearing within a 'reasonable' time") have intepreted the law in identical fashions. Similarly, in *Wright v. Mathews*, 587 F.2d 345, 351 (7th Cir. 1978), the Seventh Circuit agreed "... that the SSA is under a statutory duty to provide hearings and Appeals Council reviews within a 'reasonable time.' "

(B) In the instant case, the district court found that the delays suffered were so endemic and so susceptible to correction that a violation of § 205(b) by the Secretary was easily discernable. Careful heed was paid to problems of administrative burden raised by the Secretary, which were weighed against the evidence of unreasonable delays before the court. Upon considering the Vermont record before it (which, significantly, contained virtually none of the nationwide data injected into this proceeding by the Secretary only upon appeal), the court found that uncontroverted lengthy delays could not be justified.

Similarly, each federal court of appeals that has considered the issue of unduly lengthy delays in the administrative appeals of claimants seeking Social Security disability benefits has found the Secretary to be in violation of § 205(b) of the Act. Delays in the Titles II and XVI disability programs are of paramount concern, of course, for as Petitioner concedes, "(t)he vast majority of these hearing requests are in disability cases." Pet. at 4.

Thus, the first case to consider the question of unreasonable delay, *White v. Mathews, supra,* did so in the context of the Title II disability program that was involved in the instant case. In *White,* the Second Circuit was clearly impressed with the extensive factual record developed by the district court below it. The court of appeals noted, e.g., that delays ran the better part of a year, that the ALJ reversal rate exceeded 50% and that the court below had carefully explored the administrative difficulties besetting SSA that had caused the delays to occur. *White,* 559 F.2d at 858-59. Finding support in this Court's rulings in *Mathews v. Eldridge,* 424 U.S. 319 (1976) and *NLRB v. Rutter-Rex Mfg. Co.,* 396 U.S. 258 (1969), the Second Circuit concluded upon the facts that administrative problems did not make reasonable the pervasive failure to provide hearings in the timely fashion contemplated by Congress in legislating § 205(b). *Ibid.* Shortly thereafter, in a Title XVI disability delay case, the Second Circuit again found a statutory breach based upon a similar factual record. *Barnett, supra,* 580 F.2d at 30 - 31. Other Second Circuit cases have also followed *White* in pertinent part. *See, e.g., Sharpe, supra; Martinez v. Califano,* No. 73-C-900 (E.D.N.Y., Jan. 3, 1978).

Social Security disability administrative appellate delays have similarly been held unreasonable upon factual records developed within the First and Sixth Circuits. In *Caswell, supra,* the First Circuit was confronted by a record showing an average elapsed time of 569 days between hearing request and decision, with none of the plaintiffs "... charged with any default or action which delayed scheduling of the hearings." 583 F.2d at 12. The record also established reversal rates and specific logistical difficulties encountered by the Secretary which were

similar to those identified in *White*. *Id.* at 12 - 13. Thus, the First Circuit concluded that the Secretary was "... under a statutory duty to hold hearings within a time that is reasonable *under the circumstances;* and we are also satisfied *on this record* ... that the lower court did not err in finding that the delays then experienced by plaintiffs were unreasonable." (emphasis added). *Id.* at 15. The court of appeals even emphasized that future changed circumstances might merit modification of its order by the district court. *Id.* at 18.

In *Blankenship, supra,* the Sixth Circuit noted the absence of absolute standards to determine what is reasonable. It focussed on the nature of the proceedings and the agency's problems in processing disability appeals. Citing the examples of the named plaintiffs who had all waited a year to a year and a half for favorable decisions, the court found that median delays of 220 days and the substantial hardships suffered as a consequence outweighed the administrative difficulties besetting SSA. The facts established "... that the delays faced by the plaintiffs *in the present case* are unreasonable and contrary to the agency's statutory mandate." (emphasis added). *Id.* at 334.

The Seventh Circuit is the only other court of appeals to reach the merits of a case alleging unreasonable delays in SSA appeals. While it is true that *Wright, supra,* reached a conclusion seemingly at odds with the substantial weight of authority discussed hereinabove, Respondents submit that the case is distinguishable on a number of grounds. As the Seventh Circuit itself emphasized in distinguishing its ruling from *White, Caswell* and their progency more critically than does the Pet. at 14, n. 15, the *Wright* plaintiffs sought only retirement and survivors benefits and not the disability benefits at issue elsewhere. 587 F.2d at 350, n. 5. The named plaintiff claimed an *increase* in an old age pension due to failure to credit his late wife's work record. 587 F.2d at 347 and 355. The "nature of the particular benefits" was in large part responsible for *Wright's* legal conclusions. *Id.* at 356.

In *Mathews v. Eldridge, supra,* 424 U.S. at 341 - 42, this Court recognized the often significant hardships

endured by physically disabled workers, who have fewer options than the average retired person or survivor who may find "temporary employment to ameliorate the interim loss."[9] In *Wright*, the Seventh Circuit seemed cognizant that in appeals involving reconstruction of work records, uncredited earnings, or disputed family relationships, the proof may be as complex as in the welfare benefit area where a wide variety of information, including witness credibility and veracity, may be critical. In contrast, this Court has emphasized that the disability determinations not at issue in *Wright* are "... more sharply focussed and easily documented decision[s] [which] ... will turn, in most cases, upon 'routine, standard, and unbiased medical reports by physician specialists' ..." *Eldridge*, 424 U.S. at 343 - 44.

The Seventh Circuit's concern that "unreasonableness" would take so many forms as to make a court incompetent to act, 587 F.2d at 352 - 53, is lessened considerably by the careful documentation in the instant case of numerous, unjustified examples of non-claimant caused delay, by the Secretary's own professed capacity to comply with the remedy adopted, and especially by the district court's careful crafting of exceptions to its general time limitation rules. C.A. App. 39a; Pet. App. F at 33a - 34a. Yet straining to analogize to *Wright*, the Petitioner accuses the courts that have condemned delays in disability cases of having "myopically consider[ed] only respondents' individual concerns," Pet. at 20. On the contrary, as discussed hereinabove, each disability delay case reached its inescapable legal conclusion only after scrutinizing the administrative burdens upon the Secretary and balancing them against the acute needs of disabled persons trapped interminably within the appeals system through no fault of their own.

The legal conclusion in *Wright* is best understood from the perspective of plaintiffs' failure therein to allege or prove a pattern of SSA actions or inactions which

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[9]The Secretary herself cited a report finding likely "great damage" and "high psychic costs" resulting from delays in the disability program processes. *Barnett*, 580 F. 2d at 32.

caused lengthy delays. 587 F.2d at 353. Yet, much as this Court relied upon the factual record to identify delays in the scheduling of California unemployment hearings in violation of the Social Security Act, *California Dept. of Human Resources v. Java*, 402 U.S. 121, 133 (1971),[20] so too did the lower courts in the instant case have the well-developed factual record that was absent in *Wright*. Thus, *Wright (and FTC v. Weingarten*, 336 F.2d 687,692 (5th Cir. 1964), where there was a "passage of time and nothing more") are easily distinguishable, for there was insufficient factual development therein to establish the unreasonable nature of the hearing delays and the resultant violation of § 205(b) of the Act.

It can be seen, then, that every court that has considered the issue agrees that claimants are entitled to administrative appeals within a reasonable time. Furthermore, there is no disagreement that, given a sufficient factual record, the courts have properly declared that the Secretary has failed in her duty to provide reasonably prompt appeals.

II. THE COURTS OF APPEALS UNIFORMLY RECOGNIZE THEIR OBLIGATION TO REMEDY VIOLATIONS OF §205(b) OF THE SOCIAL SECURITY ACT.

(A) Each court of appeals that has considered the merits of a Social Security disability delay case has required the Secretary to remedy breaches of her statutory duties. The Secretary raises the spectre of "different results". Pet. at 12. In fact, however, the orders of the First, Second and Sixth Circuits differ only in certain respects as to remedy, based in large part upon the differing factual records before each court at the time of its deliberations. In any event, differences in remedial approach hardly necessitate the intervention of this Court.

In the instant case, the district court considered the problem of remedy against the backdrop of two possible injunctive approaches: an order that the Secretary process/schedule appeals within a reasonable deadline (the

[20] *See, also, Fusari v. Steinberg*, 419 U.S. 379, 388 (1975).

approach in the First and Second Circuits); or an order that the Secretary promulgate regulations to cure the statutory violations (the Sixth Circuit mechanism). Not surprisingly, it chose the former course of action. This remedial approach was initiated in *White*, wherein the court required ALJ disability hearings[21] to be concluded within 120 days of request. The *White* order gave the Secretary years of lead time before the 120 day deadline took effect, and provided both the detailed exceptions to the general deadline rule and interim payment sanctions that were followed in the instant case. 559F.2d at 855,860.

White was followed in *Barnett, supra*, with two new twists. The district court order that was approved required the mere *scheduling* of hearings within a deadline, albeit within 90 days (after a year of lead time). However, the Second Circuit found this approach "... to be less of a burden for the SSA in most cases than determining the disability issue within 120 days, as in *White*." 580 F. 2d at 32. More importantly, the court of appeals found that the district court had "abused its discretion" in ordering interim payment sanctions to be nonrecoupable by the Secretary. Stressing the delicate equitable solution inherent in balancing the litigants' interests, the court modified the judgment below and required interim payments to be refundable. Subsequently, *Sharpe* and *Martinez, supra*, also followed *White* and *Barnett* in pertinent part.

The First Circuit approach adopted in *Caswell, supra*, differed in no meaningful respect, for the court adopted a 90 day-to-hearing remedy identical to *Barnett*. While it is true that the Maine district court below had declined to impose an interim payment sanction "at this time" (preferring instead to monitor the Secretary's compliance), 435 F. Supp. 127, 136, it is inaccurate to conclude (as does the Petition at 12-13) that the First Circuit's decision diverged in any way from the Second Circuit approach. The interim payment sanction was simply not before the

[21] Reconsideration delays were not at issue in *White* or any other case discussed hereinafter.

former court of appeals in *Caswell*..[22]

The 1978 remand order of the Sixth Circuit in *Blankenship v. Secretary of HEW*, 587 F. 2d 345, *supra*, established the alternative remedial approach of ordering the promulgation of regulations by the Secretary. In making this ruling, the Sixth Circuit vacated the district court's time deadline remedy, preferring to give the Secretary "... an opportunity to develop a nationwide rule ... the preferable remedy ... establishing *reasonable time limits* for conducting hearings..."[23] (emphasis added). 587 F. 2d at 336. Yet the Secretary failed in this "opportunity". After proposing three consecutive sets of regulations imposing time-limits, each of which was in turn approved by the district court on remand, the Secretary ultimately chose to forego publication of any of the court-approved deadlines, and petitioned for complete relief from the Sixth Circuit's mandate. This prompted the frustrated Kentucky district court to require publication of the regulations last submitted by the Secretary and to order an

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[22] Although it is now in *Crosby v. Social Security Administration*, 550 F. Supp. 1278 (D. Ma. 1982), *appeal pending*, No. 83-1077 (1st Cir. 1983). There, based upon the Secretary's dismal failure to achieve even 50% compliance with a preliminary order requiring hearings to be concluded within 165 days of request (as per her own then proposed regulations) the district court ordered hearing deadlines *with* an interim payment sanction. 550 F. Supp. at 1279, n. 4 and 5, 1282-83. In so doing, *Crosby* cited the need for interim payments as a compliance mechanism, as articulated in *Blankenship v. Secretary of HHS*, 532 F. Supp. 739 (W.D. Ky., 1982), discussed *infra*.

[23] Likewise, the other courts of appeals also would respond favorably to an ultimate comprehensive solution to the unreasonable delay problem, whether from Congress or the Secretary. *See, e.g., Caswell*, 583 F.2d at 18; *White*, 559 F.2d at 861; *Barnett*, 580 F.2d at 32; *Day*, Pet. App. A at 7a.

interim payment sanction.[24] 532 F. Supp. at 743.

Having found no violation of § 205(b) in *Wright*, the non-disability case, the Seventh Circuit never reached the question of remedial action. Yet since *Wright* was decided, this Court has emphatically rejected the Seventh Circuit's underlying notion that the judiciary lacks equitable powers to implement the Social Security Act by requiring procedures not authorized by the Secretary. *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979).[25] Even *Wright* conceded that "judicial intervention may be needed at some point." 587 F. 2d at 356. Indeed, the Seventh Circuit has since concluded that a factual record establishing delay to be unwarranted is sufficient justification to require Medicaid claims to be processed within judicially imposed time limits, with a sanction of automatic eligibility for violations. *Smith v. Miller*, 665 F. 2d 172 (7th Cir. 1981).

In the instant case, neither court below can seriously be critiqued for the remedial approach adopted. The district court gave careful attention to the need for uniform, thorough, and accurate decision-making, as is apparent in the liberal exceptions to the ninety day deadline. Pet. App. F at 33a, 34a. Given the Secretary's assurance of ability to comply, C.A. App. 39a, 41a, the court was justified in concluding, as stated in *Wright, supra*. at 353, that "SSA could increase its productivity under the present

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[24] In addition to being cited favorably in *Crosby, supra* at n. 22, this approach has been followed to the letter by a district court in the Eighth Circuit in *Williams v. Schweiker*, 541 F. Supp. 1360 (E.D. Mo. 1982). It should also be noted that one other court of appeals has considered a district court order enjoining disability program delays. In *Cockrum v. Harris*, 634 F.2d 1358 (D.C. Cir. 1980), *vacating and remanding* 475 F. Supp. 1222, the District of Columbia Circuit never reached the merits. Instead, its order was premised solely upon the belief that regulations were imminent, pursuant to *Blankenship*. App. A, attached hereto. Significantly, the court was assured by the Secretary that a 90 day-to-hearing, 30 days (more) - to -disposition rule would remain in effect in the District of Columbia until final approval of the anticipated regulations.

[25] Significantly, *Yamasaki* favorably cited the approach of the First Circuit in *Caswell*. 442 U.S. at 706, n.18.

resource constraints." The wisdom of the remedial approach chosen below is especially obvious when compared to the consequences resulting from the remand ordered in *Blankenship* by the Sixth Circuit, after its recognition in 1978 of statutory violations indistinguishable from those at issue here. These results, including conceptual difficulties for the district judge, wasted judicial and administrative resources, and especially the absence of relief for the wronged plaintiffs, are now under review by the Sixth Circuit, five years later. *See, Blankenship*, 532 F. Supp. at 742 - 44; Pet. at 13, n.14. Indeed, if the Sixth Circuit affirms the lower court's order, the courts of appeals will all have settled on essentially the same remedy in seeking to bring the Secretary into compliance with the Act.

(B) In considering the DIB program, this Court has restated the Secretary's acknowledgement that the " '... system must be fair - and it must work.' " *Richardson v. Perales*, 402 U.S. 389, 399 (1971). This Court has also noted on numerous occasions that, in cases of "nigh interminable delay," procedures must be worked out to clear up docket congestion. *See, e.g., Federal Power Commission v. Hunt*, 376 U.S. 515, 527 (1964) (critiquing "... the dangers inherent in the accumulation of a large backlog of cases with its accompanying irreparable injury to the parties.")

The Secretary argues, however, that the decisions below run afoul of principles of deference to agency discretion and separation of powers. Pet. at 21. Yet finding that the Social Security Act had been violated and seeing no other adequate remedy of law[26] the district court would have abdicated its responsibility by failing to fashion an appropriate remedy pursuant to its equitable powers. *Califano v. Yamasaki, supra*, 442 U.S. 682, 705 (1979); *Hutto v. Finney*, 437 U.S. 678 (1978); *Hills v. Gautreaux*, 425 U.S. 284 (1976). These cases are typical of those enunciating both the broad reach of judicial authority,

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[26] Both courts below were well aware of the numerous difficulties unleashed by the remand-for-regulations approach in *Blankenship*. *See, e.g.*, Pet. App. A at 5a - 6a.

and the breadth and flexibility of equitable powers where authorities fail in affirmative obligations, which principles apply in statutory as well as constitutional violation cases. *Hecht v. Bowles*, 321 U.S., 321, 329-30 (1944); J.I. *Case Co. v. Borak*, 377 U.S. 426, 433 (1964).

The cases cited by Petitioner alleging abuse of judicial authority below are clearly distinguishable. For example, *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978) is no bar to the relief granted herein. While this Court critiqued the challenge to administrative regulations in *Vermont Yankee*, the instant case attacks the very absence of regulations and the Secretary's ongoing failure to comply with "statutory minima." *Id.* at 548. Indeed, this Court was careful to clarify that "(a)dministrative decisions *should* be set aside in this context, *as in every other*, only for substantial procedural or substantive reasons as *mandated by statute...*" *(emphasis added) Id.* at 558. The judicial processing deadlines were imposed below to prevent irreparable injury to claimants caused by repeated administrative failure to come to grips with the problem of non-compliance with § 205(b) of the Act. This failure, which the record showed to be so unnecessary in so many cases, served to rebut the "presumption of regularity" which normally applies to the Secretary's administration of the Act. *See, Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971).

Similarly, there exists no legal authority barring the interim payment sanction utilized to insure the effectiveness of the court's order. The scope of equitable jurisdiction, to secure complete justice, does not yield to dubious arguments or inferences. *Porter v. Warner Holding Co.*, 327 U.S. 395, 398 (1946). Contrary to Petitioner's characterization, the interim payments should not be referred to as "disability insurance benefits," since they represent merely a mechanism[27] to insure compliance with an out-

[27] The district court could have as easily chosen the sum of $100 per month, or $500, or any other approach in seeking to secure compliance. *See, e.g., Rodriguez v. Swank*, 496 F.2d 1110, 1113 (7th Cir. 1974), *cert. denied*, 419 U.S. 885 (1974). A fully recoupable sum equivalent to the amount of DIB's otherwise due, however, represented a reasonable accomodation, easy to administer.

standing court order. Pet. App. A at 8a. The alternative remedial sanction, exercise of the contempt power in individual cases, would not benefit most wronged claimants, would interfere with judicial economy, and would be conceptually ludicrous. However, monetary payments contingent upon non-compliance with an injunction represent a traditional means of enforcement. *United States v. United Mine Workers of America*, 330 U.S. 258, 303-04 (1947). The "... federal courts are not reduced to issuing injunctions ... and hoping for compliance, since financial penalties imposed prospectively against ... officials are usually the most effective of enforcement weapons." *Hutto v. Finney, supra*, 437 U.S. at 690. Neither *Schweiker v. Hansen*, 450 U.S. 785 (1981) nor *INS v. Miranda*, U.S. , 74 L.Ed. 2d 12 (1982) undercut the interim payment sanction, for in neither case was the question of the scope of a trial court's equitable powers at issue. *Hansen* was concerned only with misuse of the doctrine of equitable estoppel that had precluded SSA from raising a claimant's own failure to comply with a requirement of the Act. In *Miranda* there was neither a statutory requirement of reasonable processing nor any record evidence of unwarranted delay as in the instant case. Here, however, violations by the Secretary of both the statute *and* the court's remedial order are necessary to activate the interim payment device.[28]

In sum, the remedial approach adopted by the courts below responded appropriately to proven violations of

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[28] Nor does the doctrine of sovereign immunity, Pet. at 22, bar the issuance of an order providing prospective relief to remedy a statutory violation. *See, Ex Parte Young*, 209 U.S. 123 (1908); *Milliken v. Bradley*, 443 U.S. 267, 289 (1977); *Quern v. Jordan*, 440 U.S. 332, 337 (1979) (notice remedy advising recipients that they could appeal to the state for retroactive payments did not violate sovereign immunity because the charge on the treasury depended upon the actions of state officials.) Both *Army and Air Force Exchange v. Sheehan*, U.S. , 72 L.Ed. 2d 520 (1982) and *United States v. Testan*, 424 U.S. 392 (1976), cited by the Secretary, involved retroactive claims for back pay. In this case, the Secretary will only pay prospectively if she violates a court order.

the Act and stayed well within boundaries of equitable authority long recognized by this Court. While differences in remedial approaches are ever narrowing, any such variations hardly constitute a significant split in the circuits necessitating the intervention of this Court.

III. THE UNIQUE RECORD IN THIS CASE AND ONGOING ADMINISTRATIVE AND LEGISLATIVE DEVELOPMENTS MITIGATE AGAINST SUPREME COURT INVOLVEMENT TO SETTLE THE ISSUES RESOLVED BELOW.

(A) Numerous limiting factors mitigate against the exercise of certiorari jurisdiction. First, Vermont is a small rural state of about half a million people with only a few hundred appellate requests to process annually, *supra* at 2-3, and it hardly represents the ideal laboratory in which to examine problems present only elsewhere. Even when the Secretary articulates difficulties in complying with judicial deadlines, she cites only alleged problems incurred in Massachusetts or New York. Pet. at 16, n. 17 and 17,n. 21. Similarly as Respondents have noted, *supra*, the Petition conspicuously fails to discuss any Vermont data or facts from the record considered by the courts below. The nationwide data cited by the Secretary for the first time on appeal simply does not rebut the frequent examples of lengthy unexplained delay ascertained below nor the even-handed effectiveness of the Vermont order.[29] Likewise, the Petition alleges no need to

[29] Some of the other Social Security delay cases, however, contain factual records stressing national data. *Blankenship, e.g.*, with its nationwide remedy, would be a far more appropriate backdrop against which to examine the Secretary's claim of undue administrative burden. Indeed, the Secretary acknowledged as much when, in applying for (and obtaining) a sixty day extension in which to file the instant Petition, she relied primarily upon the hope that the Sixth Circuit would have acted in *Blankenship* by now. *See, Application For An Extension Of Time Within Which To File A Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit* (Dec. 1982).

divert resources to Vermont nor any increased administrative burden upon the Secretary's operations there as a result of the decisions below.

It is significant as well that the instant case is the only one to address the problem of delay at the reconsideration stage of appeal. In fact, the Secretary stresses that reconsideration processing "... is primarily the responsibility of the states, not the federal government." Pet. at 12. Respondents submit that this represents tacit acknowledgement that at least reconsideration delays are so factually unique as to be far from a matter of paramount concern to this Court. Indeed, the State of Vermont's failure to intervene over the five year course of this litigation is indicative of the absence of any adverse impact upon Vermont processes.

Even with her emphasis upon problems beyond Vermont's borders, the Secretary's claim of undue burden seems dubious. In one recent delay case, she stipulated to a near universal ability to comply with court orders 99% of the time in the five SSA regions of the country where orders were in effect. *Williams v. Schweiker, supra,* 541 F. Supp. at 1364. This seems hardly consistent with the claim that "increasing balkanization" impedes efficient nationwide administration. Pet. at 17. It certainly illustrates that judicial remedies in the delay cases have resulted in few payouts under interim payment sanctions. In any event, many of the difficulties allegedly encountered by the Secretary are largely of her own making.[30]

(B) In all of the disability delay cases, the Secretary has repeatedly sounded the theme "... that the problem inherently is one for administrative or legislative - not judicial - resolution." Pet. at 20. Indeed, at least since 1975, congressional activity has been ongoing. *Id.* at 19. Yet the Secretary fails to note that the lack of legislative time-frames is directly related to her frequent soothing assurances to Congress that the problem of disability

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[30] *See* discussion, *supra,* at 4-6 and *infra,* especially n. 31.

delays would shortly be cured."[31] No solution, however, has been forthcoming from the Secretary, notwithstanding the *Blankenship* litigation and the unfulfilled 1980 Congressional mandate to "recommend the establishment of appropriate time limitations." Pet. at 6. The Petition goes on to attach significance to the fact that "Congress took no action to impose such deadlines after receiving the Secretary's report."[32] *Ibid.* Yet, neither has Congress legislated any changes in the judicial deadline approach that has been extant since the *White* district court order in 1976. The absence of conclusive legislative action is not dispositive of the issue. *Girouard v. United States*, 328 U.S. 61, 69 (1946). Congressional inaction as easily represents approval of the approaches taken in the disability delay cases as the converse.

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[31] *See, e.g., White*, 559 F.2d at 860 and n. 10 regarding the 1975 promise of a June, 1977 90 day-to-hearing capability. Congress has repeatedly signaled its willingness to commit resources to maintain "... an adequate staff so that reasonable case-processing times exist at all levels of adjudication." H. Comm. On Ways and Means, *Report on the Disability Amendments of 1982*, No. 97-588, 97th Cong. 2nd Sess. (1982) at 20. However, even at the end of 1981, SSA was still assuring Congress that under current resource limits, processing delays would be minimal and caseloads under control by the end of fiscal year 1983. *Social Security Appeals and Case Review Process*, Hearings Before the Subcomm. on Social Security of the H. Comm. on Ways and Means, Serial 97-31, 97th Cong., 1st Sess. 18, 21 (Oct. 23, 28, 1981).

[32] This is an ironic argument, indeed. Pub. L. 96-265, § 308 required a recommendation to Congress of "the maximum period of time" in which Title II hearing decisions would be complete. The Secretary's response - 165 days - included attached regulations to that effect "to be promulgated in connection with the *Blankenship* case." In fact, SSA sent a report to the relevant subcommittee "specifying the time limits which we believe are realistic, which we plan to achieve, and for which we expect to be held accountable." House Comm. On Ways and Means, Subcomm. on Soc. Sec., *Status of the Disability Insurance Program*, WMCP 97-3, 97th Cong. 1st Sess. (1981), App. C at 43, 45. This proposal, later repudiated, *see supra* at 16, was hardly calculated to lead to legislated deadlines.

Congress is now clearly moving in the direction of ever increasing protections for disabled claimants suffering unreasonable delays. A nationwide legislative resolution of the problem may be imminent, for "a comprehensive review of the disability program" is to be undertaken this year. 128 Cong. Rec. 13860 (daily ed. Dec. 3, 1982) (remarks of Sen. Dole).

Indeed, in its most recent Social Security legislation, Pub. L. 97-455, 96 Stat. 2497 *et seq.* (1983), Congress enacted numerous protections that should cure many of the difficulties perceived by the Secretary. For example, Sections 4 and 5 of the law, requiring face-to-face interviews and termination hearings in the reconsideration process, will undoubtedly alleviate the hearing backlog as more cases are resolved favorably for claimants prior to the ALJ level and its 65% reversal rate. The relaxation of the periodic review requirement in Section 3 will help achieve the same end. In addition, Section 2 of the new law now provides for continued benefits pending an ALJ hearing in CDI cases, which is similar to the relief provided below in the event of continuing unreasonable delays that violate the court's order. Significantly, however, the new law does *not* include Rep. Pickle's proposed amendment that would have prohibited the interim payment sanction utilized in the instant case.[33]

Finally, it remains beyond dispute that, despite ongoing involvement in the delay problem, Congress has *never repudiated, nor modified,* the "reasonable" requirement in § 205(b) of the Act. As the Second Circuit noted below in following the approach of *Caswell,* the possibility of ultimate congressional action " 'does not mean that a judicial role is precluded where the statutory

[33] *See,* H.R. 6181, H.R. Rep. No. 97-588, 97th Cong., 2d Sess. § 10 (1982). Detection by this Court of any inconsistencies between the latest SSA amendments and the relief granted below, which Respondents do not concede, would provide no basis for granting the instant Petition. At most, a remand to the Second Circuit for re-examination of its ruling in light of the amended statute might be appropriate. *See, Fusari V. Steinberg, supra.*

mandate is not being followed.' " Pet. App. A at 6a. Similarly, the Sixth Circuit's 1978 remand order acknowledged that "... courts may not abdicate their role and deny any *effective* remedy because the problem is difficult." *Blankenship*, 587 F.2d at 336 (emphasis added).

The Secretary predicts dire consequences unless this Court takes steps to curtail "the proliferation" of decisions such as the ruling below. The courts in this case, however, in reviewing Respondents' complaints about her practices in Vermont, found little to justify the Secretary's anxiety. Nothing in this case has ever shown that the outcome affects SSA's practices nationwide, and it is thus a poor vehicle for an examination of those practices by this Court. Furthermore, to the extent that delays in administrative appeals have generated concern beyond the borders of Vermont, it is apparent that Congress is keenly aware of the tension between the courts and SSA. The impact of the latest statutory amendments, certain of which were adopted "on a one-year experimental basis," (Pet. at 6), cannot yet be estimated, and additional enactments are probable. With the Act in a state of flux, review by this Court at this time on this record would be premature, at best.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,
Richard H. Munzing, Esq.
Vermont Legal Aid, Inc.
COUNSEL FOR RESPONDENTS

April 4, 1983

APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 79-1751, 79-1752, & 79-1937 September Term, 1980

LENA COCKRUM, *et al*

v.

PATRICIA ROBERTS HARRIS, as Secretary of the Department of Health and Human Services, Appellant

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Appeals from the United States District Court GEORGE A. FISHER, clerk of Columbia.

Before: WRIGHT, Chief Judge, and MIKVA and EDWARDS , Circuit Judges.

JUDGEMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel.

Because of the action being taken by the Secretary implementing the order of the United States Court of Appeals for the Sixth Circuit (*see Blankenship v. Secretary of HEW*, 587 F.2d 329 (6th Cir. 1978), *vacating and remanding* W.D. Ky. Civil Action No. 75-0185), in our view this case should be remanded to the District Court here to await a final judgment in the above litigation in the Sixth Circuit. We have received official assurance from counsel for the Government that the interim guidelines now being followed by the Secretary of 90 days for holding a hearing and 30 days for disposition will continue in effect until the Secretary's regulations are finally approved. If and when approved, the District Court here should consider dismissal of its judgment. In the meantime, its judgment should be stayed, subject to further review, if necessary.

Under the circumstances, therefore, it is by this court so ordered.

Per Curiam
For the Court
George A. Fisher
Clerk

Office-Supreme Court, U.S.
FILED
APR 29 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1371

In the Supreme Court of the United States

OCTOBER TERM, 1982

SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

LEON S. DAY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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TABLE OF AUTHORITIES

Page

Cases:

Barnett v. *Califano*, 580 F.2d 28 2

Blankenship v. *Secretary of HEW*, 587 F.2d 329 2

Caswell v. *Califano*, 583 F.2d 9 2

Hutto v. *Finney*, 437 U.S. 678 5

Lehman v. *Nakshian*, 453 U.S. 156 5

Schweiker v. *Hansen*, 450 U.S. 785 5

United States v. *Erika, Inc.*, 456 U.S. 201 5

United States v. *MacCollom*, 426 U.S. 317 5

United States v. *United Mine Workers*, 330 U.S. 258 5

Wright v. *Califano*, 587 F.2d 345 ..... 1, 2

Statutes:

Social Security Act, Title II, 42 U.S.C. (& Supp. IV) 401 *et seq.* 2

42 U.S.C. (Supp. IV) 405(b) 1, 2

Pub. L. No. 97-455, 96 Stat. 2497 3

Section 2, 92 Stat. 2498 3

Section 4, 92 Stat. 2499 3

Miscellaneous:

Note, *Judicial Resolution of Systemic Delays in Social Security Hearings*, 79 Colum. L. Rev. 959 (1979) 2

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We have three observations concerning respondents' brief in opposition to the petition for a writ of certiorari.

1. Respondents argue (Br. in Opp. 9-14) that there is no conflict among the circuits warranting this Court's intervention. But the conflict is obvious. The Second Circuit in this case construed 42 U.S.C. (Supp. IV) 405(b) to require the imposition of judicial time limits on the Social Security adjudication process, while the Seventh Circuit in *Wright* v. *Califano*, 587 F.2d 345 (1978), declined to do precisely that. Respondents argue that although the Seventh Circuit in *Wright* "reached a conclusion seemingly at odds" with the decision below and other cases (Br. in Opp. 12), *Wright* is distinguishable because it involved the processing of claims for old age and survivors benefits, while the instant case involves claims for disability benefits. This effort to distinguish the two cases is wholly unavailing. The old age

and survivors benefits involved in *Wright* and the disability benefits at issue in the instant case all are paid pursuant to Title II of the Social Security Act, 42 U.S.C. (& Supp. IV) 401 *et seq.*, and the hearings under the programs are conducted by the same corps of administrative law judges pursuant to the same statutory authority, 42 U.S.C. (Supp. IV) 405(b).

There is, moreover, no indication that the Seventh Circuit in *Wright* regarded the particular benefits claimed as a relevant factor. To the contrary, the court explicitly declared its disagreement with the Second Circuit's position and stated that by considering the agency's resource limitations and expanding caseload, not merely the individual claimants' interests, it viewed the timing problem in a "broader context" than did the Second Circuit in *Barnett* v. *Califano*, 580 F.2d 28 (1978), and the First Circuit in *Caswell* v. *Califano*, 583 F.2d 9 (1978). See 587 F.2d at 351. See also *id.* at 354 n.15 (other circuits "have taken a contrary view"); Note, *Judicial Resolution of Systemic Delays in Social Security Hearings*, 79 Colum. L. Rev. 959 (1979) (explaining that *Wright* conflicts with the Second Circuit's approach). In addition, although the Sixth Circuit in *Blankenship* v. *Secretary of HEW*, 587 F.2d 329 (1978), concluded that the processing times involved there were unreasonable, it explicitly rejected the First and Second Circuits' approval of judicially imposed time constraints. See 587 F.2d at 334-336.

Thus, there plainly is a conflict among the circuits on the basic issues in this case. The proliferation of such cases in the lower courts and the varying decrees that have been entered (see Pet. 12-18 & nn.13, 14 & 16) necessarily will

exacerbate HHS's difficulties in administering its nationwide benefit programs in the future.[1]

2. Respondents claim (Br. in Opp. 21-26) that Vermont, the state directly involved in this case, is not an "ideal laboratory" (*id.* at 21) for consideration of the Social Security processing backlogs. They initially contend (*id.* at 21-23) that the court of appeals' imposition of judicial time limits and interim benefit requirements is unlikely to burden the Social Security Administration (SSA) severely because the decision applies only to Vermont, a small rural state. But, as we explain in the certiorari petition (at 15-18), the issue of processing times in Social Security cases is one of nationwide dimensions. It already has been the subject of a number of different court orders, including ones applying to the much larger States of New York and Connecticut in the Second Circuit alone. See Pet. 7, 12 n.12, 16 n.17. Indeed, the court of appeals in this case acknowledged that its decision "may have a significant impact on [SSA's] operations" (Pet. App. 6a).

Respondents also argue (Br. in Opp. 24-25) that recent amendments to the Social Security Act affecting cases in which benefits have been terminated (Pub. L. No. 97-455, 96 Stat. 2497) weigh against review in the instant case. Precisely the opposite is true. Sections 2 and 4 (96 Stat. 2498, 2499) of the recent amendments provide for face-to-face hearings by state agencies at the reconsideration stage in benefit termination cases and further provide, until the end of this fiscal year, for the continued payment of benefits in termination cases through the ALJ stage of the administrative appeals process. Congress did not, however, impose any comparable requirements in the processing of new

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[1]We have been informed by HHS that 34,808 requests for ALJ hearings were received in the month of March 1983, the most ever received in one month in the history of the Social Security program.

applications for benefits. These amendments demonstrate that when Congress believes that the payment of interim benefits is appropriate because of the possible hardship that might result from the passage of time prior to an ALJ hearing, it has expressly authorized their payment. In limiting the availability of interim benefits under the 1982 amendments, Congress reasonably could conclude that persons who are already receiving benefits have a greater interest in receiving such benefits pending an ALJ decision than do persons who are applying for benefits for the first time and thus are not yet dependent upon them. The 1982 amendments also demonstrate that Congress' response to the hearing delay problem was not to impose deadlines on the ALJ hearings conducted by HHS, as the court below did, but to afford an additional opportunity for a face-to-face hearing at the earlier reconsideration stage of the appeals process conducted by the States, and then only in termination cases. These limited amendments therefore underscore the inappropriateness of ad hoc judicial orders imposing a patchwork of inconsistent processing requirements in various parts of the country.

Nor can the 1982 amendments confidently be expected to have a significant effect on the ALJ hearing process as a practical matter. We have been informed by HHS that benefit termination cases account for only approximately 30% of all ALJ hearing requests. Moreover, although it is possible that some ALJ hearings might be rendered unnecessary in termination cases if meritorious claims are identified in the face-to-face hearings that are now required at the reconsideration stage, any such decrease might well be offset by an increase in requests for ALJ hearings in termination cases by those who lose at the reconsideration stage because, under the 1982 amendments, those claimants can now continue to receive benefits if they request an ALJ hearing.

3. Respondents attempt to support the court of appeals' "interim payment sanction" by contending that "there exists no legal authority barring the * * * sanction" (Br. in Opp. 19). In fact, of course, Congress' express provision for payment of interim benefits in certain situations — termination cases — strongly indicates that such benefits are barred in all others. See, *e.g.*, *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982); *Lehman* v. *Nakshian*, 453 U.S. 156, 162-163 (1981). In any event, "[t]he established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress." *United States* v. *MacCollom*, 426 U.S. 317, 321 (1976) (plurality opinion). There is no affirmative authorization for payment of interim Social Security benefits in non-termination cases. Respondents' view that the courts nonetheless may order payment of interim benefits as an "equitable remedy" also conflicts with *Schweiker* v. *Hansen*, 450 U.S. 785 (1981), where this Court held that the equitable doctrine of estoppel does not permit a court to order the payment of benefits under the Social Security Act where the statutory eligibility requirements have not been satisfied.[2]

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[2]Citing *United States* v. *United Mine Workers*, 330 U.S. 258, 303-304 (1947), and *Hutto* v. *Finney*, 437 U.S. 678, 690-691 (1978), respondents argue (Br. in Opp. 20) that monetary payments contingent upon non-compliance with an injunction represent a traditional way of enforcing an injunction. However, the discussion in those cases concerned monetary penalties imposed upon a party who had been held in contempt for violating a previous order. The prospective ordering of the payment of interim benefits in the instant case did not rest on the court's exercise of its contempt power.

For these reasons and the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

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v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether persons seeking disability benefits under the Social Security Act are entitled by statute to reconsideration of their claims by the State agency and to an administrative hearing by the Secretary of Health and Human Services within the fixed periods of time imposed by the district court.

2. Whether, in the absence of statutory authorization, a court may require the Secretary to pay benefits from the Disability Insurance Trust Fund on an interim basis to persons who have not been found entitled to them, because judicially imposed deadlines for the adjudication of disability claims have not been met.

II

PARTIES TO THE PROCEEDING

The petitioner is the Secretary of Health and Human Services, Margaret M. Heckler. The respondents are Leon S. Day and Amedie Maurais, who are representatives of the following class of claimants for disability benefits under Title II of the Social Security Act, 42 U.S.C. (& Supp. V) 401 *et seq.*:

> All present and future Vermont residents seeking to secure Social Security disability benefits who, following an initial determination by the [Secretary] that no disability exists, experience an unreasonable delay in the handling of and/or issuance of decisions in reconsiderations and fair hearings.

Pet. App. 12a n.1.*

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* Respondents Day and Maurais had received an ALJ hearing and decision prior to the district court's certification of the class on June 14, 1979. The district court held that the case was not moot, however, concluding that the case fell within the exception recognized in *Gerstein* v. *Pugh*, 420 U.S. 103, 110 n.11 (1975), for situations in which the challenged condition is temporary and the issue as regards any particular class representative might become moot before the district court even could rule on the class certification issue (J.A. 84). See also *Sosna* v. *Iowa*, 419 U.S. 393, 402 n.11 (1975); *United States Parole Commission* v. *Geraghty*, 445 U.S. 388, 398-399 (1980). The district court also found that respondents Day and Maurais would be suitable representatives of the class in these circumstances (J.A. 83). See *United States Parole Commission* v. *Geraghty*, *supra*, 445 U.S. at 405-407.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement:	
A. Background	2
1. The statutory and regulatory framework	2
2. The administrative law judges and the hearing process	6
B. The proceedings in this case	10
1. The district court's decision	10
2. The court of appeals' decision	13
Summary of argument	14
Argument:	
I. The district court was not authorized by the Social Security Act or the Administrative Procedure Act to require that requests for a hearing and reconsideration in disability cases be acted upon within a fixed period of time	18
A. The imposition of fixed hearing deadlines is inconsistent with the text and legislative history of the Social Security Act	19
B. The timing of ALJ hearings in the disability program does not violate 42 U.S.C. 405(b)	31
C. The Secretary's scheduling of hearings does not violate the Administrative Procedure Act	39
D. The courts below erred in extending processing deadlines to the reconsideration stage	44

Argument—Continued Page

II. The district court was without authority to order the payment of interim benefits to individuals whose claims are not processed within the judicially imposed deadlines 46

Conclusion 50

Appendix 1a

TABLE OF AUTHORITIES

Cases:

Army & Air Force Exchange v. *Sheehan*, 456 U.S. 728 47
Barnett v. *Califano*, 580 F.2d 28 ..... 11, 38
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Caswell v. *Califano*, 583 F.2d 9 ..... 14, 38, 39
Chrysler Corp. v. *Brown*, 441 U.S. 281 43
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Cases—Continued Page

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United States v. *Erika, Inc.*, 456 U.S. 201 21
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United States v. *Sherwood*, 312 U.S. 584 46-47
United States v. *Testan*, 424 U.S. 392 ..... 46, 47
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Will v. *Calvert Fire Insurance Co.*, 437 U.S. 655 43
Wright v. *Califano*, 587 F.2d 345 ..... 38, 39, 44

Constitution, statutes and regulations:

U.S. Const.:

Art. I, § 9, Cl. 7 47
Amend. V (Due Process Clause) 13

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42 U.S.C. 405(a) 37, 2a
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Constitution, statutes and regulations—Continued Page

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Sections 404.907-404.921 3
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Section 404.944 ..... 9, 34
Sections 404.967-404.983 5
Section 404.1503 3
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Section 404.1810 22
Part 416 subpart N 6

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1371

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

LEON S. DAY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 685 F.2d 19. The opinions of the district court (Pet. App. 12a-20a, 21a-31a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 10a) was entered on June 28, 1982, and a petition for rehearing was denied on September 17, 1982 (Pet. App. 11a). On December 7, 1982, Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including February 14, 1983. The petition was filed on that date and was granted on April 25, 1983 (J.A. 207). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of Sections 205, 221, 223 and 1631 of the Social Security Act, 42 U.S.C. (& Supp. V) 405, 421, 423 and 1383; Sections 304(g) and 308 of the Social Security Disability Amendments of 1980, Pub. L. No. 96-265, 94 Stat. 456, 458; and the recodified provisions of the Administrative Procedure Act, 5 U.S.C. 554(b), 555 (b) and 706, are reproduced in the Appendix, *infra*, 1a-19a.

STATEMENT

A. Background

1. *The Statutory and Regulatory Framework*

This case arises under Title II of the Social Security Act, which provides disability insurance benefits to an individual suffering a medically determinable physical or mental impairment if he is unable to do his previous work or to engage in any kind of substantial gainful work that exists in the national economy. 42 U.S.C. 423(d)(1)(A) and (2)(A). See *Heckler* v. *Campbell*, No. 81-1983 (May 16, 1983), slip op. 1. These benefits are paid out of the Federal Disability Insurance Trust Fund in the Treasury, which is funded by payroll taxes. 42 U.S.C. (Supp. V) 401(b). Disability benefits also are payable under the Supplemental Security Income (SSI) program established by Title XVI of the Social Security Act, 42 U.S.C. (& Supp. V) 1381 *et seq.* See 42 U.S.C. 1382(a)(2)(B) and 1382c(a)(3).

The disability programs established by Titles II and XVI "are of a size and extent difficult to comprehend." *Richardson* v. *Perales*, 402 U.S. 389, 399 (1971). In fiscal year 1981 alone, approximately 2.3 million claims for disability benefits were filed under the two Titles. *Heckler* v. *Campbell*, *supra*, slip op. 3 n.2. To provide for an orderly determination of the eligibility of this number of individuals, Congress and the Secretary of Health and Human Services (HHS) have prescribed in meticulous detail a multi-stage procedure for the administrative con-

sideration of disability claims. Should it be determined at any stage of this procedure that an individual is eligible for benefits, he is entitled to retroactive payments for the period of his eligibility. 42 U.S.C. (& Supp. V) 404 and 423(b); see *Mathews* v. *Eldridge*, 424 U.S. 319, 339 (1976).

a. Under the Title II program, a State agency first determines whether a claimant has a disability and the date when the disability began or ceased. 42 U.S.C. (Supp. V) 421(a); 20 C.F.R. 404.1503. If the claimant is dissatisfied with this determination, he may request a de novo reconsideration by the State agency. 20 C.F.R. 404.907-404.921. Additional evidence often will be submitted at the reconsideration stage, including examination of the individual by a consulting physician. See Pet. App. 23a; *Richardson* v. *Perales*, *supra*, 402 U.S. at 393-394; *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 338 n.20. In fiscal year 1982, more than 503,000 requests for reconsideration were processed.[1]

In recent years, Congress has enacted two additional procedural requirements at the reconsideration stage. First, in the Social Security Disability Amendments of 1980 (Pub. L. No. 96-265, Section 305(a), 94 Stat. 457), Congress amended 42 U.S.C. 405(b) to require that in any disability case in which the State agency's decision is adverse to the claimant, the decision must contain an easily understandable discussion of the evidence and the reasons for the determination of ineligibility. Although Congress recognized that such individualized notice would consume more resources and might increase processing time, it concluded that requiring the State examiner to formulate written reasons for his decision would improve the adjudicatory process and that the claimant might be less likely to appeal if he understood those reasons.

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[1] Office of Hearings and Appeals, U.S. Dep't of Health and Human Services, *Key Workload Indicators (FY May 1983)* 15 (June 29, 1983) ("*Key Workload Indicators*"). We have lodged a copy of the May 1983 edition of the monthly *Key Workload Indicators* with the Clerk of this Court.

S. Rep. No. 96-408, 96th Cong., 1st Sess. 56-57 (1979); H.R. Rep. No. 96-100, 96th Cong., 1st Sess. 12 (1979).

Second, in 1982 Congress provided that, beginning no later than January 1, 1984, whenever a State agency initially determines that a person previously entitled to benefits no longer is under a disability and that his benefits therefore should be terminated, the person must be afforded an evidentiary hearing at the reconsideration stage.[2] Moreover, as a temporary measure, the 1982 legislation authorized the payment of interim benefits, pending a final decision after a hearing in HHS (see page 5, *infra*), to a person whom the State agency has found no longer to be disabled.[3] Congress did not, however, provide for an additional hearing at the reconsideration stage or interim benefits for individuals whose *new* applications for disability benefits were denied by the State agency at the initial determination stage.

b. When it enacted the disability program in 1954, Congress authorized the Secretary, on his own motion, to review and overturn any determination by a State agency in favor of the claimant. 42 U.S.C. (1952 ed. Supp. II) 421(c); 68 Stat. 1082. Until 1972, the Social Security Ad-

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[2] Pub. L. No. 97-455, Section 4, 96 Stat. 2499, adding a new paragraph (2) to Section 205(b) of the Social Security Act, to be codified at 42 U.S.C. 405(b)(2).

[3] Pub. L. No. 97-455, Section 2, 96 Stat. 2498, adding a new Subsection (g) to Section 223 of the Act, to be codified at 42 U.S.C. 423(g). The authorization for interim benefits applies only to initial determinations in disability benefit termination cases made on or after (or pending on administrative review on) the effective date of the Act (January 12, 1983) but before October 1, 1983. Benefits may continue to be paid in such cases after October 1, 1983 until the HHS Administrative Law Judge (ALJ) renders his decision or until June 1984, whichever is earlier. These benefits are subject to recoupment if the initial determination that benefits should be terminated is affirmed on appeal, although recoupment may be waived in accordance with 42 U.S.C. (& Supp. V) 404. A bill has been introduced in the Senate to make the interim benefits authorization permanent in benefit cessation cases. S.476, 98th Cong., 1st Sess. § 5 (1983).

ministration (SSA) in HHS reviewed the majority of State determinations. In 1972, as a result of a growing workload and efforts to reduce costs, SSA switched to a sample review of only 5% of the State agencies' determinations in favor of the claimant, and even those cases were reviewed only after the State's determination had gone into effect and payment of benefits had begun. Over the next few years, however, Congress became concerned that the quality and uniformity of State decisions were deteriorating because of an undue emphasis on expediting the claims process in response to the backlog of cases. See S. Rep. No. 96-408, *supra*, at 52-56; H.R. Rep. No. 96-100, *supra*, at 8-10. Consequently, Congress included in the Disability Amendments of 1980 a requirement that, beginning in fiscal year 1983, the Secretary must review 65% of all State determinations in favor of the claimant before those determinations are put into effect. 42 U.S.C. (Supp. V) 421(c)(2) and (3). The 1980 amendments also provided for the Secretary to review State determinations that are unfavorable to the claimant. 42 U.S.C. (Supp. V) 421(c)(1).[4]

c. If the final State agency decision after reconsideration is adverse to the claimant, he is entitled to an evidentiary hearing by an Administrative Law Judge (ALJ) in HHS. 42 U.S.C. (Supp. V) 405(b)[5]; 42 U.S.C. (Supp. V) 421(c); 20 C.F.R 404.929-404.961. If the claimant is dissatisfied with the decision rendered after the hearing, he may take an appeal to the Appeals Council in HHS. 20 C.F.R. 404.967-404.983. The Secretary also was directed by Section 304(g) of the Disability Amendments of 1980 (94 Stat. 456) to institute a program for the Appeals Council to review ALJ decisions on

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[4] The Secretary actually had instituted such reviews in some cases prior to 1980. At the times relevant to this case, for example, certain State agency reconsiderations of decisions terminating benefits to previously eligible individuals were reviewed by SSA in Baltimore before they became final (Pet. App. 24a).

[5] We shall delete "Supp. V" in future references to this Section.

its own motion, because of what Congress perceived to be a lack of uniformity among ALJ decisions and between decisions rendered by ALJs and the State agencies. H.R. Conf. Rep. No. 96-944, 96th Cong., 2d Sess. 57-58 (1980); S. Rep. No. 96-408, *supra*, at 53.

After a claimant has exhausted his administrative remedies in this fashion,[6] he may seek judicial review of a final denial of benefits pursuant to 42 U.S.C. (Supp. V) 405(g). Under 42 U.S.C. 405(i), payment of disability benefits may be made out of the Disability Trust Fund upon a final decision of the Secretary or a final judgment of a court that a person is entitled to such benefits. Pursuant to a specific directive added by the Disability Amendments of 1980, once a person has been found by a State agency, the Secretary, or a court to be disabled, his case thereafter must be reviewed periodically to determine whether he still is under a disability. See 42 U.S.C. (Supp. V) 421(h).[7]

2. *The Administrative Law Judges and the Hearing Process*

a. The hearings provided for in 42 U.S.C. 405(b) are conducted by a corps of ALJs in the Office of Hearings and Appeals (OHA) in SSA. 20 C.F.R. 404.929. The cost of the ALJs, their support staffs, and other expenses of SSA, as well as the State agencies' costs associated with the disability program, are paid out of the Trust Funds in "such amounts as the Congress may deem appropriate" (42 U.S.C. (Supp. V) 401(g)(1)(A); see also 42 U.S.C. (Supp. V) 421(e)). To implement

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[6] Similar procedures are followed in SSI disability cases under Title XVI of the Act. See 20 C.F.R. Part 416 subpart N.

[7] In general, this review must occur at least once every three years. 42 U.S.C. (Supp. V) 421(h). In 1983, Congress authorized the Secretary, on a State-by-State basis, to modify the requirement for continuing disability reviews every three years if the backlog of such reviews, the number of new applications, and staffing levels in a State so warrant. See Pub. L. No. 97-455, Section 3, 96 Stat. 2499.

the quoted provision, Congress specifies in annual appropriation acts the maximum amount of money to be made available for administering the Social Security programs. See, *e.g.*, Pub. L. No. 95-480, 92 Stat. 1567, 1582.

The total number of ALJ hearings requested annually under all Social Security programs increased from approximately 72,000 in fiscal year 1973 to more than 320,000 in fiscal year 1982.[8] The vast majority of these hearing requests were in disability cases.[9] HHS has projected that hearing requests will reach 379,000 in fiscal year 1983.[10] This increase will result in part from the requirement imposed by Congress in 1980 that the Secretary provide for a periodic review of the eligibility of individuals who are receiving disability benefits (see page 6, *supra*).[11]

To meet this greatly expanded workload, the number of ALJs in HHS has been increased from 420 in fiscal year 1973 to approximately 800 at the present time. The support staff per ALJ more than doubled during this period, and, on the average, there are now more than four support personnel for each ALJ. The result of these and other administrative initiatives by the Secretary has been to increase the average number of dispositions per

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[8] *Key Workload Indicators*, *supra* note 1, at 1.

[9] In fiscal year 1980, for example, more than 95% of all hearing requests involved Title II or Title XVI disability claims. Staff of the House Comm. on Ways and Means, 97th Cong., 1st Sess., *Social Security Hearings and Appeals: Pending Problems and Proposed Solutions* 2 (Comm. Print 1981).

[10] Social Security Administration, U.S. Dep't of Health and Human Services, *1983 Annual Report to Congress* 49 (May 1983). Statistics for the first eight months of fiscal year 1983 in fact reflect a substantial increase. Hearing requests averaged approximately 26,725 per month in fiscal year 1982 but approximately 29,570 per month during the first eight months of fiscal year 1983—including an all-time record of 33,112 filed in March 1983 and 31,471 and 32,264 filed in April and May of 1983, respectively. *Key Workload Indicators*, *supra* note 1, at 1.

[11] See Comm. Print, *supra* note 9, at 1.

ALJ each month from 14 in 1973 to 34 in 1982. Currently, an ALJ processes an average of more than 1.5 cases each working day.[12]

Between 1973 and 1982, the nationwide average time from the date on which an evidentiary hearing was requested to the date on which the ALJ rendered his decision varied between a high of 288 days in fiscal year 1976, when *Mathews* v. *Eldridge* was decided (see 424 U.S. at 341-342), to a low of 151 days in 1979. In fiscal year 1982, the average processing time was 174 days, the same as it had been in 1973,[13] thereby indicating that SSA has been able to absorb the more than fourfold increase in its hearing caseload since 1973 without extending the time needed to conduct such hearings beyond what it was a decade ago. Nevertheless, because of the continually expanding caseload, the number of pending cases had grown to more than 152,000 at the end of fiscal year 1982 and more than 171,000 at the end of May 1983, an all-time record. And the average number of cases pending per ALJ stood at 203 in September 1982 and 221 in May 1983, another all-time record.[14]

b. The Secretary has adopted detailed procedures governing the scheduling and conduct of hearings by ALJs. A request for an ALJ hearing is assigned to the Hearing Office of OHA responsible for the region in which the claimant resides. The Hearing Office staff is responsible for ensuring that the procedural prerequisites to a hearing have been satisfied and for procuring the case file from the appropriate office of SSA. See Social Security Administration, U.S. Dep't of Health and Human Services, *Office of Hearings and Appeals Hand-*

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[12] *Key Workload Indicators*, *supra* note 1, at 1.

[13] *Key Workload Indicators*, *supra* note 1, at 1. The processing time has fluctuated in fiscal year 1983 between a low of 177 days in October 1982 and a high of 189 days in January 1983. For cases decided in April and May 1983, the average processing time was 185 days. *Ibid.*

[14] *Key Workload Indicators*, *supra* note 1, at 1.

book §§ 2-310 to 2-319 (Apr. 1982) ("*OHA Handbook*"). When those materials are assembled, the case is assigned to an ALJ in rotation insofar as possible, taking into account individual ALJ dockets. *Id.* §§ 1-313, 1-314. At this point, jurisdiction over the case passes to the ALJ. *Id.* § 1-310.

The ALJ is required to look fully into the issues and facts in the case, even if the claimant does not adequately present them himself. 20 C.F.R. 404.944. Accordingly, the ALJ's staff must conduct a prehearing workup of the case, in which they identify the issues for the hearing, review the evidence in the file to determine whether additional material is required, isolate conflicts in the evidence, propose exhibits for the record, determine whether material from any prior hearings should be transcribed or included, consider whether a vocational expert or medical advisor should be present at the hearing, and decide whether a prehearing interview or conference would be appropriate. *OHA Handbook*, *supra*, at §§ 1-300, 1-344, 1-349, 1-620. It then may be necessary for the ALJ, either before or after the hearing (20 C.F.R. 404.944), to request additional medical evidence from the claimant, the State agency, or a physician who recently has examined the claimant or performed a consultative examination for the ALJ (*OHA Handbook*, *supra*, at §§ 1-510 *et seq.*, 1-520, 1-521, 2-326-40, 2-330, 2-500 *et seq.*). The ALJ also may request vocational testimony from an expert (*id.* §§ 1-530 *et seq.*), earnings information from various sources (*id.* § 1-542), and information about the claimant's age, citizenship, or similar matters from other agencies (*id.* §§ 1-544, 1-545).

The ALJ is responsible for scheduling the hearing within the framework of priorities established by SSA. 20 C.F.R. 404.936(a); *OHA Handbook*, *supra*, at § 2-350. Consistent with "[t]he administrative objective * * * that a hearing be held as soon as possible after the [request for a hearing] is filed" (*id.* § 1-360), the *OHA Handbook* states that "[a] hearing date should be selected as soon

as the prehearing workup is completed; all outstanding evidence requested by the ALJ has been received; and it is clear that the request cannot be disposed of without a hearing" (*id.* § 2-351). The *OHA Handbook* provides that, as a general matter, cases are to be scheduled for a hearing in the order in which the hearing requests were received. However, the ALJs also must coordinate the scheduling of hearings in various locations. *Id.* §§ 1-313, 2-351. The *OHA Handbook* further provides that SSI nondisability cases must be expedited, as required by the Act. 42 U.S.C. 1383(c)(2). Finally, by *OHA Handbook* Interim Circular No. 138, dated March 31, 1982, the Commissioner of Social Security directed that hearings to review a State agency's decision to terminate benefits are to be given priority over hearings to review a State agency's denial of an initial application for benefits.

B. The Proceedings in This Case

1. *The District Court's Decision*

This class action was filed by respondent Day in the United States District Court for the District of Vermont on November 15, 1978. Respondents alleged that an unreasonably long period of time elapsed in Title II disability cases in Vermont between a claimant's request for reconsideration and the State agency's decision on reconsideration and between a request for an ALJ hearing and the convening of the hearing (Pet. App. 12a-13a & n.1).[15]

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[15] Respondent Day, who had been receiving benefits pursuant to a prior finding of disability, was found by the State agency no longer to be disabled. He requested reconsideration of that determination on December 21, 1977, and his claim was denied after reconsideration on June 6, 1978, 167 days later. Day then requested an ALJ hearing, which was held on December 4, 1978, 173 days after he requested the hearing and several weeks after he filed this suit. On January 17, 1979, the ALJ issued a decision reaffirming the decision to terminate his disability benefits (Pet. App. 13a-14a).

Respondent Maurais, who intervened in this suit on December 1, 1978 (Pet. App. 14a), also had been receiving benefits pursuant to

a. On December 28, 1978, the district court granted partial summary judgment for respondents with respect to the timing of ALJ hearings (Pet. App. 12a-20a). Relying on the Second Circuit's prior decisions in *White* v. *Mathews*, 559 F.2d 852 (1977), cert. denied, 435 U.S. 908 (1978), and *Barnett* v. *Califano*, 580 F.2d 28 (1978), the district court held that the provision in 42 U.S.C. 405(b) for the Secretary to afford a claimant "reasonable notice and opportunity for a hearing" requires that the ALJ hearing be conducted within a "reasonable" time after it is requested (Pet. App. 15a).[16]

The district court did not question the Secretary's submission that "SSA has made a good faith effort to meet the needs of claimants for disability benefits while protecting the fiscal integrity of its program with the limited resources available" (Pet. App. 17a). Indeed, the court agreed that "SSA has made admirable strides in reducing the average length of delay experienced by claimants a few years ago" (*ibid.*). Nevertheless, based solely on evidence that 43% of Vermont residents who requested hearings on their Title II disability claims in 1978 waited more than 90 days for their hearings, the

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a prior determination of disability. In April 1978, Maurais was notified of the State agency's determination that his disability had ceased. He requested reconsideration of that initial determination, and an adverse reconsideration decision was rendered on January 4, 1979, 215 days after his request. Maurais then requested an ALJ hearing, and that hearing was held 65 days later. Maurais' benefits were reinstated following the hearing (Pet. App. 14a).

[16] In *White* v. *Mathews*, *supra*, a class action by Title II disability claimants in Connecticut, the court of appeals had held that the average period of 211.8 days between a hearing request and the ALJ's decision was not "reasonable" and ordered the Secretary to reduce that time period for Connecticut claimants to 120 days. 559 F.2d at 858-860. In *Barnett* v. *Califano*, *supra*, the court of appeals had held that the period of 6 or 7 months that ordinarily elapsed in Title XVI disability cases in Vermont was unreasonable and ordered that hearings be held within 90 days. 580 F.2d at 31-33.

court found that a substantial number of claimants had not had a hearing within a reasonable time (Pet. App. 17a). The court therefore ordered that ALJ hearings be held within 90 days of a request, subject to certain exceptions for delays caused by the claimant (*id.* at 33a-34a).

b. On August 19, 1981, the district court granted summary judgment for respondents on the reconsideration aspect of the case as well (Pet. App. 21a-31a). Although 42 U.S.C. 405(b) does not mention the reconsideration stage, the court explained that reconsideration by the State agency is an administrative prerequisite to an ALJ hearing and that unreasonable delays in reconsideration therefore undercut the right to an ALJ hearing within a "reasonable" time (Pet. App. 27a).

The district court found that in a sample of 77 Title II disability cases in Vermont processed between 1977 and 1980, reconsideration time ranged between 17 and 251 days, with a mean time of 68 days. Approximately 35% of these reconsideration cases took more than 90 days to process. The court acknowledged that "the reconsideration process is often time consuming and complex" (Pet. App. 25a) because of the need to locate and procure the claimant's folder, update existing evidence or gather new evidence, arrange for a consultative examination where indicated, perform a vocational evaluation, prepare notices, and allow time for quality control reviews both by the State agency and by SSA (*id.* at 23a-24a, 28a-29a). The court also acknowledged that SSA should retain flexibility to implement the additional notice and quality review provisions required by the Disability Amendments of 1980 (Pet. App. 29a & n.8; see pages 3, 5, *supra*). But the court concluded that a claimant should not have the timing of his hearing affected by what it termed "inefficient agency procedures" or "unnecessarily lengthy" internal quality control checks (*id.* at 28a). Against this background, the court held that the passage of more than 90 days between a request for reconsideration and the

decision on reconsideration was not "reasonable" (*id.* at 28a-29a), and it ordered that reconsideration be accomplished within a 90-day period, except where the time consumed in excess of that amount is attributable to the claimant (*id.* at 33a).

c. The district court also ordered the Secretary to pay interim disability benefits to any claimant who has not received a reconsideration determination or hearing within 180 days of the request for reconsideration or has not received an ALJ hearing within 90 days of a hearing request, even though the claimant has not yet been found entitled to such benefits by the State agency or the Secretary. These benefits are made subject to recoupment by the Secretary if the claimant ultimately is determined not to have been eligible to receive them (Pet. App. 30a-31a, 34a-35a).[17]

2. *The Court of Appeals' Decision*

The court of appeals affirmed the district court's decision in all respects (Pet. App. 1a-9a). The court of appeals expressed its "sympath[y] with the severe problems that beset SSA" and its "understand[ing] that [the district court's] decision may have a significant impact on [SSA's] operations" (*id.* at 6a). But the court nevertheless concluded that judicially imposed timetables were appropriate for the processing of the " 'flood of claims' " confronting SSA (*ibid.*, quoting *White* v. *Mathews*, *supra*, 559 F.2d at 859).

The court of appeals "share[d] the First Circuit's concern that 'if the Secretary's resources truly are inadequate to the task, the more litigious of the applicants may gain an advantage over the less assertive' " (Pet.

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[17] Because the district court found violations of the Social Security Act, it did not reach respondents' arguments that the challenged practices violate the Due Process Clause of the Fifth Amendment and the Administrative Procedure Act (Pet. App. 15a, 26a). The court of appeals likewise did not consider those arguments (*id.* at 9a n.8).

Caswell, that it should not be deterred from awarding

App. 7a, quoting *Caswell* v. *Califano*, 583 F.2d 9, 17 (1st Cir. 1978)). The court concluded, however, again quoting relief to respondents by " 'the alleged inability of the [Secretary] fully to meet his obligations to others' " (*ibid.*). The court of appeals also recognized "that in the last five years Congress has involved itself heavily in the administration of this Act" and that "Congress has refused to impose its own deadlines." But the court viewed Congress' failure to impose deadlines as perhaps suggesting that Congress is satisfied that the problem of the timing of ALJ hearings is being handled effectively by the courts (Pet. App. 7a). In addition, the court of appeals approved the district court's extension of its holding in *White* v. *Mathews*, *supra*, to the processing of claims by State agencies at the reconsideration stage (Pet. App. 7a-8a).

Finally, the court of appeals concluded that the provisions of 42 U.S.C. 405(i) limiting payments from the Trust Fund to situations in which the Secretary or a court has found the claimant entitled to benefits do not " 'exclud[e] the possibility of interim payments ordered by a court exercising its remedial power' " (Pet. App. 8a, quoting *White* v. *Mathews*, *supra*, 559 F.2d at 861). The court rejected the contention that its approval of interim benefits in *White* v. *Mathews* was undermined by this Court's subsequent decision in *Schweiker* v. *Hansen*, 450 U.S. 785 (1981), explaining that the award of interim payments at issue here flows from the "district court's inherent powers to fashion a remedy" (Pet. App. 8a-9a).

SUMMARY OF ARGUMENT

The decision of the court of appeals, imposing arbitrary time limitations on the administrative adjudication of disability claims under the Social Security Act, represents an unwarranted judicial intrusion into an area carefully considered and pervasively regulated by Congress and the Secretary of Health and Human Serv-

ices. The Court's ruling is without statutory basis and, indeed, is inconsistent with Congress' repeated refusal to include processing deadlines in disability cases. If upheld, the ruling will substantially disrupt the disability program and will impair the accuracy and fairness of administrative decision-making.

I

A. There is no requirement in 42 U.S.C. 405(b) that hearings on claims for benefits under Title II of the Social Security Act be conducted within a fixed period of time. In contrast, the parallel provision for hearings under the Supplemental Security Income (SSI) program in Title XVI of the Act requires that a decision be rendered within 90 days of a request for a hearing. 42 U.S.C. (Supp. V) 1383(c)(2). This demonstrates that when Congress wants to impose hearing deadlines, it expressly so provides. Moreover, *disability* cases are specifically excluded from the hearing deadline even under the SSI program, thereby indicating Congress' determination that fixed processing times are especially inappropriate in this category of cases. Congress likewise excluded disability cases from the provision in 42 U.S.C. 405(q) for expedited benefit payments, because a lengthy investigation often is required in such cases.

In addition, Congress repeatedly has refused to impose deadlines on the hearings by Administrative Law Judges (ALJs) because of its concern that arbitrary time limitations could adversely affect the thoroughness and accuracy of their decisions. Indeed, in the Disability Amendments of 1980, Congress directed the Secretary to recommend appropriate time limits that would take these concerns into account. But Congress did not amend 42 U.S.C. 405(b) to impose deadlines after the Secretary submitted his report, even though it did amend 42 U.S.C. 405(b) in 1982 to expedite the opportunity for a hearing in another way—by providing for a hearing at the State agency reconsideration stage in benefit termination cases.

Given Congress' extensive attention to the question and persistent refusal to impose deadlines, the courts below erred in doing so.

B. Whether existing procedures afford a "reasonable • • • opportunity for a hearing" under 42 U.S.C. 405(b) presents a question of statutory interpretation and therefore requires a consideration of congressional intent and of the statutory scheme governing the review of disability claims. Processing times that are an entrenched feature and foreseeable consequence of the manner in which Congress and the Secretary have jointly implemented the Social Security Act over the last decade cannot properly be held to violate that Act.

Thus, in concluding that any period of time in excess of 90 days for holding an ALJ hearing is not "reasonable" except where the claimant delays the proceedings, the court below focused too narrowly on the claimant's interest in expedited ben fit determinations to the exclusion of other considerations Congress has deemed relevant. For example, the ALJ is required to look fully into the issues in the case, and Congress repeatedly has stressed that the interest in speedy resolution of claims does not outweigh the need for thoroughness and accuracy. The timing of hearings also must accommodate the need for quality review of State agency and ALJ decisions, additional procedural steps Congress has mandated, and the limited personnel resources available. The court below could not properly second-guess the manner in which Congress and the Secretary have balanced these competing concerns by enforcing its own view of what would be an appropriate time within which to resolve disability claims.

C. The Administrative Procedure Act does not support the judgment below. Under 5 U.S.C. 555(b), an agency must conclude a matter pending before it "within a reasonable time," but also "[w]ith due regard for the convenience and necessity of the parties." The latter phrase indicates that an agency's workload and procedures must

be considered in scheduling hearings. Moreover, the question of what constitutes a "reasonable time" for purposes of Section 555(b) must take into account all relevant factors under the substantive program involved, including resource limitations, the complexity of scheduling a vast number of hearings, and the need for thorough and accurate decision-making.

Under 5 U.S.C. 706(1), a reviewing court may compel agency action "unreasonably delayed." This phrase connotes an intentional retarding of action from its normal course, and thus does not describe the Secretary's orderly disposition of the enormous backlog of disability cases under established procedures and resources limitations. The legislative history and the Attorney General's contemporaneous interpretation of the APA confirm that Section 706(1) does not justify the imposition of program-wide deadlines where the agency is proceeding diligently and in good faith.

D. The courts below erred in imposing deadlines on the reconsideration of claims by State agencies. Congress consistently has refused to enact time limitations governing this stage of the administrative proceedings, which are not under the Secretary's day-to-day control. In addition, in the Disability Amendments of 1980, Congress left to the Secretary's discretion the question whether processing time limits should be established for State agencies.

II

The portion of the judgment below requiring payment of interim benefits to individuals whose claims are not processed within judicially fashioned deadlines fails to respect the conditions Congress has prescribed for charging the public treasury. *Schweiker* v. *Hansen*, 450 U.S. 785 (1981). Congress has authorized payments from the Trust Fund only upon a "final decision" by the Secretary or a "final judgment" by a court that an individual actually is "entitled" to disability benefits because he is under a disability and satisfies other eligibility criteria.

42 U.S.C. (& Supp. V) 405(i), 423(a)(1). Moreover, Congress has specifically addressed the question of when interim benefits should be paid pending completion of the administrative process, but it has not chosen to authorize the payment of interim benefits solely because of the passage of time in processing claims for disability benefits.

ARGUMENT

I. THE DISTRICT COURT WAS NOT AUTHORIZED BY THE SOCIAL SECURITY ACT OR THE ADMINISTRATIVE PROCEDURE ACT TO REQUIRE THAT REQUESTS FOR A HEARING AND RECONSIDERATION IN DISABILITY CASES BE ACTED UPON WITHIN A FIXED PERIOD OF TIME

As this Court has recently observed, "[t]he Social Security hearing system is 'probably the largest adjudicative agency in the western world.'" *Heckler* v. *Campbell*, *supra*, slip op. 3 n.2, quoting J. Mashaw, et al., *Social Security Hearings and Appeals*, at xi (1978). Congress and the Secretary are confronted with a task of unprecedented difficulty in fashioning procedures for the adjudication of the vast numbers of claims and requests for review submitted annually under the nationwide disability programs. In doing so, they must seek to accommodate a variety of goals—accuracy, fairness, uniformity, efficiency, and economy—that often may conflict with the goal upon which the court of appeals narrowly focused: completing the review as quickly as possible.[18]

Given the difficulty of the task, it is not surprising that few subjects have commanded such consistent attention by Congress and the Secretary as the administration of the disability program, including the persistent backlog

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[18] See J. Mashaw, *Bureaucratic Justice* 187 (1983); Note, *Judicial Resolution of Systemic Delays in Social Security Hearings*, 79 Colum. L. Rev. 959, 971 (1979); Dixon, *The Welfare State and Mass Justice: A Warning from the Social Security Disability Program*, 1972 Duke L. J. 681, 687-688.

of pending cases and the time required to process claims. But although Congress has amended the Act in a number of other respects to improve procedures for adjudicating claims, it repeatedly has rejected proposals that disability claims be ruled upon within a fixed time. This refusal stems principally from Congress' concern that such deadlines would undermine the goal of assuring a thorough and accurate evaluation of disability claims, which protects the interests of the claimant and the public.

The court of appeals' imposition of fixed deadlines that Congress and the Secretary have declined to adopt is without statutory basis, inconsistent with the statutory scheme, disruptive of the disability program, and likely to lead to inferior rather than improved decision-making. We submit that the Secretary fully satisfies her obligation under 42 U.S.C. 405(b) to provide claimants a "reasonable * * * opportunity for a hearing" by diligently processing more than 300,000 hearing requests annually in accordance with established procedures and priorities, the validity of which are not challenged here, and within the limits of available resources.

A. The Imposition Of Fixed Hearing Deadlines Is Inconsistent With The Text And Legislative History Of The Social Security Act

Congress did not include in 42 U.S.C. 405(b) fixed deadlines for holding hearings on claims for benefits under Title II of the Social Security Act. Indeed, there is no mention whatever of the timing of hearings in the text or legislative history of 42 U.S.C. 405(b) as originally enacted.[19] That Section simply provides, in the most

[19] See S. Rep. No. 728, 76th Cong., 1st Sess. 42 (1939); S. Rep. No. 734, 76th Cong., 1st Sess. 51 (1939). The Social Security Board's description of the hearing process soon after 42 U.S.C. 405(b) was enacted in 1939 recited various "Legal Considerations" regarding the nature of the hearing required by 42 U.S.C. 405(b), but, likewise, did not mention the question of timing. See Attorney General's Committee on Administrative Procedure, *Administrative Procedure in Government Agencies*, S. Doc. No. 10, 97th Cong., 1st

general terms, that the Secretary shall afford "reasonable notice and opportunity for a hearing" if the Secretary initially denies a claim. The courts below nevertheless found in this language an implicit authorization for the imposition of program-wide time limits on the processing of disability claims generally. This holding is plainly wrong.

The application to this case of the phrase "reasonable * * * opportunity for a hearing" in 42 U.S.C. 405(b) presents solely a question of statutory interpretation: what, if anything, did Congress intend the Social Security Act to require with respect to the timing of ALJ hearings in disability cases? Whatever else Congress may have intended in this regard, it is unambiguously clear that Congress did *not* intend to impose fixed deadlines on the adjudication of disability claims. As we explain in this section of the Brief, Congress repeatedly has rejected such deadlines because they could prevent the thorough and accurate review of claims. The courts below could not properly circumvent this congressional judgment by reading into the general phrase "reasonable * * * opportunity for a hearing" their own notion of what would be a "reasonable" period of time within which to conduct a hearing—90 days, under the decision in this case—and then incorporating that notion into a remedial decree that binds the Secretary in disability cases generally.

1. The absence in 42 U.S.C. 405(b) of fixed deadlines or even of any mention of the timing of hearings under Title II is in marked contrast to the parallel provision for hearings under the SSI program. See 42 U.S.C. (&

Sess. (Pt. 3) 38-40 (1941). Under a separate heading entitled "Requirements of the Administrative Task," the Board did cite expeditious processing as an important feature of the review process, in the interests of efficiency, human needs, and public relations. *Id.* at 37. The Board also recognized, however, the strong countervailing interests in fairness, uniformity, and accuracy of determinations (*ibid.*), which account for much of the time consumed in processing disability cases.

Supp. V) 1383(c). That Section, like 42 U.S.C. 405(b), provides that the Secretary shall provide "reasonable notice and opportunity for a hearing" on a claim for benefits. 42 U.S.C. (Supp. V) 1383(c)(1). But Congress further specified with respect to SSI nondisability claims that the "[d]etermination on the basis of such hearing * * * shall be made within ninety days after the individual requests the hearing * * *." 42 U.S.C. 1383(c)(2). Thus, Congress has demonstrated in the Social Security Act itself that when it intends to impose fixed deadlines on the Secretary's processing of claims, it has expressly so specified. "In light of the statute's precisely drawn provisions," the fact that Congress did not include a fixed deadline in the parallel hearing provision in 42 U.S.C. 405(b) provides "persuasive evidence" that Congress "deliberately intended" not to impose deadlines through that Section. *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982). Indeed, the fact that 42 U.S.C. (Supp. V) 1383(c)(1) contains the identical phrase "reasonable notice and opportunity for a hearing," and yet Congress found it necessary to address the question of timing of SSI hearings in a separate paragraph (42 U.S.C. 1383(c)(2)), confirms that Congress did not intend the quoted phrase to address the scheduling of hearings on a program-wide basis. See *Lehman* v. *Nakshian*, 453 U.S. 156, 162-163 (1981).

2. Congress' decision to impose a hearing deadline under Title XVI but not Title II of the Act reflects the fact that eligibility for SSI benefits, unlike benefits under Title II, is based on need. 42 U.S.C. 1382(a). Compare *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 340-342. Congress reasonably could conclude that the hardship caused by an extended waiting period in the processing of claims under Title XVI therefore would be greater than under Title II. It is significant, however, that Congress nevertheless expressly excepted *disability* cases from the 90-day hearing deadline even under the SSI program (see 42 U.S.C. 1383(c)(2)), presumably because of the complex-

ity of the disability determination. This exception makes even clearer that Congress did not intend courts to impose fixed deadlines on the processing of disability claims under Title II, where the claimant's countervailing interest in a speedy disposition weighs less heavily.

In fact, Congress made just such a judgment regarding Title II disability claims in 1968, when it added Subsection (q) to 42 U.S.C. 405 to authorize expedited payment of benefits to certain individuals pending a final decision on their claims. Pub. L. No. 90-248, Section 171(a), 81 Stat. 876. Under 42 U.S.C. 405(q), a claimant may begin to receive such benefits once 90 days have passed without a final decision following the submission of all evidence requested by the Secretary, if the Secretary determines that the individual has made a prima facie showing of entitlement. See 20 C.F.R. 404.1810. The Senate Report on the measure stressed, however, that "the Secretary should not be forced into making doubtful payments merely because of the passage of time" (S. Rep. No. 744, 90th Cong., 1st Sess. 106 (1967)). Consistent with this view, Congress excluded Title II *disability* cases from the provision for expedited payments. 42 U.S.C. 405(q)(5). The Senate Report explained:

> The process of making disability determinations is significantly different from the retirement and survivors insurance claims process. In the disability process State vocational rehabilitation agencies are involved importantly in the making of the decision and in borderline cases lengthy and extensive development of facts of a medical nature is often required. Because the Secretary should be reluctant to make a favorable finding of basic eligibility in the disability area on the basis of partial evidence, the expedited payment procedure is not provided in disability cases.

S. Rep. No. 744, *supra*, at 107.

3. Since 42 U.S.C. 405(q) was enacted in 1968, Congress has continued to express its concern that the quality of decisions should not be sacrificed to a desire to expedite

payment of benefits to eligible applicants. And although Congress repeatedly has considered the timing of ALJ hearings and has amended 42 U.S.C. 405(b) in several other respects to improve disability adjudication procedures, it consistently has rejected proposals to impose fixed deadlines in disability cases. "In view of its prolonged and acute awareness of so important an issue" (*Bob Jones University* v. *United States*, No. 81-3 (May 24, 1983), slip op. 25), Congress' refusal to do so confirms that 42 U.S.C. 405(b) does not support judicial imposition of such limitations.

In 1975, for example, the House Social Security Subcommittee held extensive hearings on the timing of Social Security administrative appeals,[20] and 60 Members cosponsored a bill (H.R. 5276, 94th Cong., 1st Sess. (1975)) to impose time limitations on all levels of review, including ALJ hearings. The Subcommittee received extensive testimony about the growing backlog of hearing requests and the resulting time between a hearing request and decision after a hearing, which then averaged more than 200 days.[21] There also was testimony regarding the ways in which the hearing system might be improved, including the hiring of additional ALJs and support staff [22] and the imposition of deadlines.[23]

After the hearings, the Subcommittee staff recommended against enactment of a law imposing deadlines on the claims process, noting that "although mandating by statute certain processing time limits might seem on

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[20] *Delays in Social Security Appeals: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 94th Cong., 1st Sess. (1975) ("*1975 Hearings*").

[21] *1975 Hearings*, *supra*, at 26, 28, 37, 39, 93, 104, 113, 146, 228, 230-232, 235, 247, 250, 259, 262, 549, 584.

[22] *1975 Hearings*, *supra*, at 39-42, 59, 62-63, 74, 228, 256-257, 439, 526, 535, 570.

[23] *1975 Hearings*, *supra*, at 23, 98, 102, 229, 246-248, 552, 575, 581-582.

the surface a desirable thing to do, such legislation might also have an adverse effect on the quality and uniformity of disability adjudication which is already somewhat suspect." [24] The Committee did not report a bill imposing time limitations, choosing instead to address the hearing backlog problem by recommending that SSI hearing examiners (who were not ALJs) be authorized to hear Title II cases on a temporary basis.[25] The legislation was enacted,[26] but congressional interest in the timing of ALJ hearings has persisted [27] and bills to limit processing times have been introduced in subsequent Sessions of Con-

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[24] Staff of the House Comm. on Ways and Means, 94th Cong., 1st Sess., *Appeals Process: Areas of Possible Administrative or Legislative Action* 1-2 (Comm. Print 1975).

[25] H.R. Rep. No. 94-679, 94th Cong., 1st Sess. 1-2, 4, 8 (1975); see also S. Rep. No. 94-550, 94th Cong., 1st Sess. 1-2, 5-6 (1975).

[26] Pub. L. No. 94-202, Section 3, 89 Stat. 1135. The hearing examiners were converted to ALJ status on a permanent basis in 1977. Pub. L. No. 95-216, Section 371, 91 Stat. 1559.

[27] For example, Representative Seiberling, the principal House sponsor of bills to impose processing deadlines, renewed his call for such deadlines soon after the 1976 law was passed. See *Disability Insurance Program: Public Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 94th Cong., 2d Sess. 341-343 (1976). See also *Administration of the Supplemental Security Income Program: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 94th Cong., 2d Sess. 111 (1976); *Administrative Law Judges, HEW Executive Level Positions, and Salary Adjustment for Director of Office of Management and Budget: Hearings Before the Subcomm. on Employee Ethics and Utilization of the House Comm. on Post Office and Civil Service*, 95th Cong., 1st Cong., 1st Sess. 10-11, 16-17 (1977); Staff of the House Comm. on Ways and Means, 95th Cong., 1st Sess., *Background Material on H.R. 5723: Conversion of Temporary Social Security ALJ's* 4 (Comm. Print 1977); Staff of the House Comm. on Ways and Means, 95th Cong., 2d Sess, *Disability Insurance—Possible Areas of Subcommittee Action* 10-12 (Comm. Print 1978); *Disability Insurance Program: 1978: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 95th Cong., 2d Sess. 15-17, 97-99 (1978).

gress. See note 32, *infra*.[28] The backlog of ALJ hearing requests and other aspects of the disability adjudication process also have been addressed repeatedly in the annual appropriations process by which Congress authorizes the expenditure of money from the Trust Funds to administer the disability program,[29] and the Appropriations Commit-

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[28] See, *e.g.*, H.R. 12466, 94th Cong., 2d Sess. (1976); H.R. 5151, 95th Cong., 1st Sess. (1977); H.R. 12672, 95th Cong., 2d Sess. (1978); H.R. 747, 96th Cong., 1st Sess. (1979); H.R. 4775, 97th Cong., 1st Sess. (1981).

[29] See *Departments of Labor and Health, Education, and Welfare Appropriations for 1978: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 95th Cong., 1st Sess. (Pt. 6) 237-238, 391-393, 398, 440, 457-459, 477-478 (1977); *Department of Labor and Health, Education, and Welfare and Related Agencies Appropriations, Fiscal Year 1978: Hearings Before the Senate Comm. on Appropriations*, 95th Cong., 1st Sess. (Pt. 3) 2353, 2372, 2373-2374, 2381 (1977); *Departments of Labor and Health, Education, and Welfare Appropriations for 1979: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 95th Cong., 2d Sess. (Pt. 6) 219-221, 484, 495-496, 502-504, 519-522 (1978); *Departments of Labor and Health, Education, and Welfare and Related Agencies Appropriations, Fiscal Year 1979: Hearings Before a Subcomm. of the Senate Comm. on Appropriations*, 95th Cong., 2d Sess. (Pt. 3) 724, 727-728, 735-736, 780-781 (1978); *Departments of Labor and Health, Education, and Welfare Appropriations for 1980: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 96th Cong., 1st Sess. (Pt. 6) 213, 218, 231-233, 291, 447, 462-463, 482, 484, 497-503 (1979); *Departments of Labor and Health, Education, and Welfare and Related Agencies Appropriations, Fiscal Year 1980: Hearings Before a Subcomm. of the Senate Comm. on Appropriations*, 96th Cong., 1st Sess. (Pt. 3) 693, 712, 718-720 (1979); *Departments of Labor, Health, Education, and Welfare, and Related Agencies Appropriations for 1981: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 96th Cong., 2d Sess. (Pt. 5) 281, 299, 341-342, 356, 556, 572, 574 (1980); *Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations, Fiscal Year 1981: Hearings Before a Subcomm. of the Senate Comm. on Appropriations*, 96th Cong., 2d Sess. (Pt. 2) 1001, 1014, 1040-1047, 1050-1051 (1980); *Departments of Labor, Health and Human Services, Edu-*

tees have monitored the problem closely.[30]

4. The Disability Amendments of 1980 further demonstrate that the existing terms of Title II of the Social Security Act cannot be read to authorize a court to impose processing deadlines on the Secretary. In Section 308 of those Amendments (94 Stat. 458), Congress directed the Secretary to submit for its consideration a report "recommending the establishment of appropriate time limitations governing decisions on claims for benefits under Title II of the Social Security Act," taking into account "both the need for expeditious processing of claims for benefits and the need to assure that all such claims will be thoroughly considered and accurately determined."[31] The enactment of this provision, looking to

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cation, and Related Agencies Appropriations for 1983: Hearings Before a Subcomm. of the House Comm. on Appropriations, 97th Cong., 2d Sess. (Pt. 5) 557-558, 635-636, 876, 896-897, 918-920, 927 (1982); *Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations, Fiscal Year 1983: Hearings Before a Subcomm. of the Senate Comm. on Appropriations*, 97th Cong., 2d Sess. (Pt. 3) 274, 330-331 (1983); *Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations for 1984: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 98th Cong., 1st Sess. (Pt. 5) 492, 527-528, 582-583, 606-607, 618-619, 658-659, 864, 873, 891-893, 898 (1983).

[30] See H.R. Rep. No. 97-894, 97th Cong., 2d Sess. 85-86 (1982), and S. Rep. No. 97-680, 97th Cong., 2d Sess. 94 (1982), both of which request the Secretary to report to the Committees on the problem. See also H.R. Rep. No. 97-251, 97th Cong., 1st Sess. 80 (1981) (recommending temporary authorization to hire non-ALJ examiners to reduce the hearing backlog, noting that "it appears impossible to deal with the backlog without extraordinary measures").

[31] The background materials on the 1980 amendments once again reflect an appreciation of the magnitude of the administrative problems facing SSA. See Staff of the Senate Comm. on Finance, 96th Cong., 1st Sess., *Issues Related to the Social Security Act Programs* 45-51, 123 (Comm. Print 1979); Staff of the House Comm. on Ways and Means, 96th Cong., 1st Sess., *Social Security*

the possible *future* establishment of statutory time limitations, is inconsistent with the notion that 42 U.S.C. 405(b) already implicitly contains such limitations in its reference to "reasonable notice and opportunity for a hearing." And, in fact, the Senate Report on the provision stated that "[u]nder present law and regulations there is no limit on the time taken by the Social Security Administration to adjudicate cases at any stage of adjudication."[32] The Senate Report explained:

> The provision requires the Secretary in recommending the limits to give adequate consideration to both speed and quality of adjudication. The Secretary's recommendations also should reflect the requirement added by this bill for Federal review of State allowances and denials. Congress could then evaluate the recommendations for consistency with the elements it wishes to emphasize and, if needed, take further action next year.[33]

After receiving the Secretary's report,[34] Congress did

Administrative Law Judges: Survey and Issue Paper 5, 63-69 (Comm. Print 1979); *Disability Insurance Legislation: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 88, 114, 119-120, 237-238, 241, 249 (1979).

[32] S. Rep. No. 96-408, *supra*, at 59; H.R. Conf. Rep. No. 96-944, *supra*, at 59. See also H.R. Rep. No. 96-100, *supra*, at 14. These reports all note, in identical language, that "[s]everal Federal district courts have imposed such limits at the hearing level and numerous bills have been introduced to set such limits at various levels of adjudication." There is no suggestion, however, that Congress approved of the judicial decisions. See pages 29-30, *infra*.

[33] S. Rep. No. 96-408, *supra*, at 59; see also H.R. Rep. No. 96-100, *supra*, at 14.

[34] HHS suggested time frames of 150 days for reconsideration of disability claims and 165 days for rendering a decision following a request for an ALJ hearing, subject to certain exceptions. These suggested time frames were based on then-recent processing experience, caseload projections, and quality indicators. Report of the

not take "further action" to impose deadlines. Cf. *North Haven Board of Education* v. *Bell*, 456 U.S. 512, 533-534 (1982). It still has not done so, even though it *did*

Department of Health and Human Services, *Implementation of Section 308, Public Law 96-265, Time Limitations for Decisions on Title II Benefit Claims* 1-2 (Oct. 21, 1980) ("Report"). HHS cautioned, however, that budget and staff limitations, projected workload increases, and the impact of other provisions of the Disability Amendments of 1980 (*e.g.*, pre-effectuation review of State agency disability decisions, personalized denial notices, and periodic review of persons already on disability) "mitigate against the Department's meeting its proposed time limitation objectives in every instance." Report, *supra*, at 2. HHS also noted that the circumstances of individual cases might make it difficult to meet deadlines—*e.g.*, the need to obtain sufficient medical documentation and coordinate with other agencies. *Ibid.* Finally, HHS stated that it would measure its performance against the time frames and recommend revisions if necessary. *Ibid.*

The suggested 165-day time limit for rendering ALJ decisions was based on the similar limit contained in proposed regulations that recently had been submitted by the Secretary to the district court on remand from the Sixth Circuit's decision in *Blankenship* v. *Secretary of HEW*, 587 F.2d 329 (1978). See Report, *supra*, at 2, 3. In *Blankenship*, the Sixth Circuit had reversed the district court's judgment requiring that hearings be held within 90 days of a request and remanded to afford the Secretary an opportunity to issue regulations to give substance to the "reasonable notice and opportunity for a hearing" requirement in 42 U.S.C. 405(b). 587 F.2d at 336.

On remand in *Blankenship*, the Secretary attempted to develop acceptable regulations and submitted several regulatory proposals to the district court. In the end, however, the Secretary concluded that the burgeoning and unpredictable caseload made any commitment to fixed deadlines in regulations unworkable. The Secretary therefore moved for relief from the requirement that he issue regulations and proposed instead to establish processing goals. The district court denied the Secretary's motion, ordered him to publish regulations requiring a hearing decision within 180 days of request, and required the payment of interim benefits when the time limits are not satisfied. *Blankenship* v. *Secretary of HHS*, 532 F. Supp. 739, 746-747 (W.D. Ky. 1982). The Sixth Circuit granted a stay in *Blankenship* pending the Secretary's appeal. The appeal was argued on October 8, 1982 (*Blankenship* v. *Secretary of HHS*, Nos. 82-5130 and 82-5204), but no decision has yet been rendered.

amend 42 U.S.C. 405(b) in 1982 to expedite a claimant's opportunity for a hearing in another way—by providing for an evidentiary hearing at the earlier reconsideration stage in benefit termination cases. See page 4, *supra*.[35] Indeed, the House Report on the bill that formed the basis for the 1982 legislation expressed its disapproval of hearing deadlines:

> Your Committee believes that a disability claimant is entitled to a timely hearing and decision on his appeal, but it also recognizes that the time needed before a well-reasoned and sound disability hearing decision can be made may vary widely on a case-by-case basis. (It is also interesting to note that the mean processing time for disability cases in some District courts is as high as five years and nationwide stands at an average of 12 months.) Additional time may be required in some cases because, for example, updated, comprehensive medical reports are needed from a claimant's treating physicians

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[35] Once more, the legislative history of the 1982 legislation reflects a full awareness by Congress of the backlog of requests for an ALJ hearing and the resulting period of 6 to 9 months or more that many individuals must wait to receive a hearing. H.R. Rep. No. 97-588, 97th Cong., 2d Sess. 12 (1982); S. Rep. No. 97-648, 97th Cong., 2d Sess. 20 (1982) (additional views of Sen. Long); 128 Cong. Rec. S13857 (daily ed. Dec. 3, 1982) (remarks of Sen. Heinz); *id.* at S13856 (remarks of Sen. Cohen); *id.* at S13859 (remarks of Sen. Armstrong); *id.* at S13860-S13861 (remarks of Sen. Levin); *id.* at S13862 (remarks of Sen. Pryor); *id.* at S13868 (remarks of Sen. Hawkins); *id.* at H10677 (daily ed. Dec. 21, 1982) (statement of Rep. Neal); *id.* at H10678 (remarks of Rep. Pickle); *id.* at S15963 (remarks of Sen. Armstrong); *id.* at S15964 (remarks of Sen. Dole); *id.* at S15964-S15965 (remarks of Sen. Levin). See also Staff of the Senate Comm. on Finance, 97th Cong., 2d Sess., *Staff Data and Materials Related to the Social Security Disability Insurance Program* 69-73 (Comm. Print 1982); *Social Security Appeals and Case Review Process: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 97th Cong., 1st Sess. 4-5, 9-11, 17-21 (1981). Representative Seiberling again urged passage of his time limits proposal (*id.* at 169-173), but Congress did not enact it.

or it is necessary to have a consulting medical specialist examine the claimant. *Establishing strict time limits for the adjudication of every case could result in incorrect determinations because time was not available to obtain needed medical evidence or to reach well-reasoned decisions in difficult cases.* SSA has recently undertaken several administrative actions to improve the timeliness of hearing decisions, such as expanding its ALJ corps and support staff, improving staff training, and installing modern equipment in hearing offices to ensure the efficient use of their resources. Your Committee will continue to emphasize and support improvements in the administrative structure and the maintenance of an adequate staff so that reasonable case-processing times exist at all levels of adjudication.[36]

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[36] H.R. Rep. No. 97-588, *supra*, at 19-20 (emphasis added). This Report was issued against the background of a report by the Staff of the Subcomm. on Social Security of the House Comm. on Ways and Means, 97th Cong., 1st Sess., *Status of the Disability Insurance Program* (Comm. Print 1981), which stated (*id.* at 13; emphasis added):

> The Subcommittee has been fully aware of the conflicting pulls of "quality" and "processing time." During the last 3 or 4 years, there have been efforts by quite a few Members of Congress to get Ways and Means and the Finance Committee to put specific time limits in the law to force the State agencies and the ALJ's to make more timely benefit decisions. *These efforts were resisted by the Committees because of the possible ramifications of less quality in decisionmaking.* In lieu of putting in such statutory requirements in the Disability Amendments of 1980, the legislation called for the Secretary to recommend appropriate time limits for the various levels of adjudication which would give "adequate consideration to both speed and quality of adjudication."

See also *id.* at 43-46. Another Staff Report of the Subcomm. on Social Security House Comm. on Ways and Means, 97th Cong., 1st Sess., *Social Security Hearings and Appeals: Pending Problems and Proposed Solutions* (Comm. Print 1981), stated (*id.* at 8; footnote omitted):

> There are a plethora of cases pending in district and circuit courts setting different time limits for hearing cases throughout the country. This has caused major disruption in the

5. In sum, Congress, with full awareness of the dimensions, causes, and complexity of the problem, consistently has eschewed fixed processing deadlines because of their potentially adverse effect on the quality of disability decisions. At every turn—in excepting disability cases from the time limitations imposed on adjudication of SSI claims by 42 U.S.C. 1383(c)(2) and from the expedited payment provisions of 42 U.S.C. 405(q), in rejecting proposals for fixed deadlines following extensive hearings in 1975, in comments made in a succession of committee and staff reports and floor debates, and in the Disability Amendments of 1980—Congress has refused to force the Secretary to act hastily in this class of cases by imposing arbitrary processing periods. Moreover, Congress by statute has now expressed its intention once again to consider the wisdom of imposing time limits, on the understanding that present law leaves the question of the scheduling of hearings to the Secretary. Cf. *Heckler* v. *Campbell*, *supra*, slip op. 8 n.10. In these circumstances, the courts below plainly erred in intruding their own view of appropriate hearing times into the Social Security disability program, and thereby improperly "engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress." *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 525 (1978).

B. The Timing Of ALJ Hearings In The Disability Program Does Not Violate 42 U.S.C. 405(b)

1. The courts below imposed hearing deadlines that Congress has rejected because they found that the Secretary's practices violated the requirement in 42 U.S.C.

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disability hearing process because ALJ's and cases must be shuttled around the country in an attempt to comply with various court orders. In a few cases benefits actually are being paid on delayed cases, as is suggested but presumably not yet ordered by the judge in the *Blankenship* case. The Social Security Administration is caught in the middle of either being in contempt of court or paying benefits without authority of law.

405(b) that claimants be provided "reasonable notice and opportunity for a hearing" (see Pet. App. 4a, 17a). This conclusion, based solely on the fact that 43% of Title II disability hearings in Vermont were not held within 90 days of a request (Pet. App. 17a), is seriously flawed.

To begin with, as shown in Part A, the courts' view that an opportunity for a hearing is not "reasonable" if the hearing is not held within 90 days is flatly inconsistent with the congressional judgment not to incorporate fixed standards of timing into the Social Security Act. But, in addition, the courts below lost sight of the fact that whether particular procedures developed by the Secretary afford claimants a "reasonable * * * opportunity for a hearing" for purposes of 42 U.S.C. 405(b) is a question of statutory interpretation arising under the Social Security Act itself; it does not turn on general notions of "reasonableness" that courts might encounter in other settings. Accordingly, the requirement in Section 405(b) that the opportunity for a hearing be "reasonable"—and any element of timing implicit in that requirement—can be given content only by reference to the overall statutory scheme and the benefits program established under that scheme.

In particular, it must be borne in mind that the claims adjudication process respondents attack is the product of the cooperative efforts of Congress and the Secretary in the amendment, oversight and administration of the Social Security Act. And it is pursuant to the authorization in that Act that Congress has made money available from the Trust Funds each year to support the claims adjudication process and thereby to define its dimensions. Congress and the Secretary have taken these actions over the last decade with full knowledge of the disability caseload and the nationwide average period required to obtain a decision following a hearing, which has never been less than 150 days. *Key Workload Indicators, supra* note 1, at 1.

"[T]his Court has been willing to assume a congressional solicitude for fair procedure" (*Califano* v.

Yamasaki, 442 U.S. 682, 693 (1979)) and has given "substantial weight" to the good faith judgment of the Secretary that the procedures she has provided "assure fair consideration of the entitlement claims of individuals" (*Mathews* v. *Eldridge*, *supra*, 424 U.S. at 349). See *Schweiker* v. *McClure*, 456 U.S. 188, 200 (1982). It is simply inconceivable that processing times that are such an entrenched feature—and direct and foreseeable consequence—of the conscientious implementation of the Social Security Act by Congress and the Secretary could be found to violate that very Act. Cf. *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 369-372 (1977). If Congress, with full appreciation of the enormous number of disability claims filed each year and the manner in which the Secretary processes them, chooses to approve a series of procedural and substantive requirements to ensure accuracy and fairness in the adjudication of those claims and to allocate a particular level of resources to accomplish that task, we submit that the normal processing period that results is by definition "reasonable" within the meaning of the statute.

Nor is there any basis for construing the phrase "reasonable * * * opportunity for a hearing" in 42 U.S.C. 405(b) to produce a contrary conclusion. In *Mathews* v. *Eldridge*, this Court held that considerations beyond the claimant's interests in a prompt hearing and receipt of benefits had to be taken into account in determining whether the procedures under review here satisfied the *constitutional* requirement of a meaningful opportunity to be heard in disability termination cases, in light of the 10 or 11 months that then generally elapsed between a request for a hearing and the ALJ's decision (424 U.S. at 341-342). A fortiori, it is necessary to consider countervailing interests and other factors Congress has made relevant under the Social Security Act in determining whether those procedures violate the *statutory* requirement of a "reasonable * * * opportunity for a hearing," in light of the considerably shorter processing times that

now prevail. Thus, in considering whether respondents' rights under 42 U.S.C. 405(b) were violated, the court of appeals in this case, as in *White* v. *Mathews*, *supra*, erred in focusing "narrowly" and "somewhat myopically" on the claimant's interest in an expeditious decision. See Note, *Judicial Resolution of Systemic Delays in Social Security Hearings*, 79 Colum. L. Rev. 959, 964, 977 (1979) ("*Systemic Delays*").[37]

The principal countervailing interests are reflected in the requirement, recently recognized by this Court, that the ALJ must "loo[k] fully into the issues" (20 C.F.R. 404.944) in every disability case even if the claimant does not adequately present all of the facts and legal arguments himself. *Heckler* v. *Campbell*, *supra*, slip op. 10-11 & n.12; *id.* at 1-2 (Brennan, J., concurring); *id.* at 1 (Marshall, J., concurring and dissenting). See also *Richardson* v. *Perales*, *supra*, 402 U.S. at 410. Complete development of the facts not only protects the claimant's narrow concerns; it also serves the broader governmental and public interest in accurate, uniform, and just determinations (see *Little* v. *Streater*, 452 U.S. 1, 14 (1981); *Lassiter* v. *Department of Social Services*, 452 U.S. 18, 27-28 (1981)), to the end that benefits from the Trust Funds are paid to eligible individuals, but to no others. Conscientious fulfillment of this obligation often requires time-consuming measures (see pages 8-10, *supra*) that might be curtailed if the complex disability determination had to be completed within too short a time frame. As the discussion in Point A demonstrates, Congress has chosen not to impose fixed deadlines on the hearing process precisely because of the fear that they might adversely affect the thoroughness and accuracy of the ALJ's inquiry into the issues. See also *Systemic Delays*, *supra*, 79 Colum. L. Rev. at 975; J. Mashaw, *Social Security*

[37] We note in this regard that if a claimant is found at any stage of the proceedings to be eligible for benefits, he is entitled to retroactive payment of such benefits for the period his claim was under review. *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 339.

Hearings and Appeals 31 (1978); J. Mashaw, *Bureaucratic Justice* 187-188 (1983).

Other values that must be taken into account by Congress and the Secretary are reflected in specific measures they have adopted in recent years to fine-tune the disability adjudication process. The medical-vocational guidelines repeatedly suggested by Congress and adopted by the Secretary in 1978 were intended to establish a procedure for the uniform, accurate, and efficient resolution of one aspect of the disability determination. *Heckler* v. *Campbell*, *supra*, slip op. 8 n.10, 9-10. Use of the guidelines may serve to expedite the decision-making process at all levels. But other measures designed to achieve uniformity and accountability—such as the provisions of the Disability Amendments of 1980 requiring Secretarial review of State agency and ALJ decisions and the periodic review of persons already receiving benefits (see pages 4-5, 6, *supra*)—may have the incidental effect of increasing processing times and the number of requests for review.

Even changes that are instituted at a particular stage to further the claimant's interest—such as the 1980 and 1982 amendments to 42 U.S.C. 405(b) requiring individualized explanation of the denial of disability benefits and an opportunity for a face-to-face hearing at the reconsideration stage in disability termination cases (see pages 3-4, *supra*)—may have the effect of increasing processing times at that stage and, as a result, postponing the succeeding levels of review. But, by the same token, these measures may actually expedite completion of the *overall* process by identifying eligible persons at an earlier stage or reducing requests for ALJ hearings by claimants who have been found ineligible by the State agency but who are satisfied with the correctness of the result. This demonstrates the complex interrelationship of the various elements of the adjudication process. The 1982 amendments also reflect the need to take into account the relative equities of different cate-

gories of claimants, for those amendments make a hearing available at the reconsideration stage only to individuals whose benefits are being terminated and who therefore have a particularly strong interest in a prompt resolution of their eligibility. Cf. *Goldberg* v. *Kelly*, 397 U.S. 254 (1970).

2. These and other measures adopted by Congress and the Secretary in recent years to improve the quality of disability determinations have resulted from a constant reassessment of the various stages of the adjudicatory process, often reflecting a shifting of emphasis among the statutory goals of accuracy, fairness, uniformity, efficiency, economy, and timeliness. The relative weight to be given these factors in fashioning appropriate procedures for reviewing disability claims is a matter for Congress and the Secretary to resolve. The requirement in 42 U.S.C. 405(b) that the Secretary furnish claimants "reasonable • • • opportunity for a hearing" therefore must be read in light of the manner in which Congress and the Secretary have sought to achieve the relevant statutory goals in structuring the adjudicatory process. A court may not second-guess these determinations by enforcing its own views of what constitutes a "reasonable" system for adjudicating disability claims.

The court of appeals did not even explore these other concerns. It did not consider the degree to which the changes in the adjudicatory process wrought by the Disability Amendments of 1980—improved notice of disability denials, increased review of State agency and ALJ decisions—would affect processing times. Nor does its judgment permit accommodation of the 1982 amendments requiring a hearing at the reconsideration stage and payment of interim benefits in termination cases, which will extend the time needed for reconsideration but at the same time lessen the need to expedite a *second* hearing before an ALJ. These failings are merely symptomatic of the defects in the courts' efforts to impose rigidity on a system that demands flexibility. As the Sixth Circuit observed in *Blankenship* v. *Secretary of HEW*, 587 F.2d

329, 335 (1978), "[s]implistic and unreasonably short time limitations imposed from the outside without a thorough understanding of the reasons for the problem will frustrate welfare administration, just as it would frustrate judicial administration."

Indeed, the court of appeals did not take issue with the procedures the Secretary has adopted to implement the "reasonable" hearing requirement. In 42 U.S.C. 405(a), Congress granted the Secretary "full power and authority" to make rules and regulations to carry out the provisions of Title II and to regulate the nature, extent, and method of taking and furnishing evidence to establish the right to benefits. See also 42 U.S.C. 1302. Pursuant to this authority, the Secretary has promulgated detailed regulations and instructions that seek to assure an accurate, fair, and uniform determination of claims and provide for a reasonable distribution of cases among available ALJs. See pages 8-10, *supra*. They also take into account the question of timing by establishing priorities under which older cases and cases involving termination of benefits are to be set for a hearing first. Within these priorities, and taking into account geographical and other considerations, cases are to be scheduled as soon as possible after the prehearing workup is completed by the ALJ's staff. These regulations and instructions, issued pursuant to authority specifically delegated by Congress, are valid unless they exceed the Secretary's power under the Act or are arbitrary and capricious. *Heckler* v. *Campbell*, *supra*, slip op. 7-8. There has been no suggestion here that the Secretary's implementation of 42 U.S.C. 405(b) is invalid on either ground.

It must be presumed that the ALJs will abide by the directives the Secretary has issued, including those pertaining to the scheduling of hearings. *Schweiker* v. *McClure*, *supra*, 456 U.S. at 196 n.9, 197 n.11; *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926). In fact, the courts of appeals that have considered the question uniformly have recognized that the Secretary has made significant efforts within the limits of available

resources to manage a caseload that has quadrupled in size over the past decade (see pages 7-8, *supra*); and no court, including either court below, has suggested the existence of bad faith or dilatory motive on the part of HHS. See, *e.g.*, *Blankenship* v. *Secretary of HEW*, *supra*, 587 F.2d at 334; *Wright* v. *Califano*, 587 F.2d 345, 352-354 (7th Cir. 1978); *Caswell* v. *Califano*, 583 F.2d 9, 17-18 (1st Cir. 1978); *Barnett* v. *Califano*, *supra*, 580 F.2d at 32; *White* v. *Mathews*, *supra*, 559 F.2d at 861.

Finally, the court of appeals failed to explain how the 90-day time frame it mandated for holding ALJ hearings could be attained on a nationwide basis given the available resources and the need to maintain thorough and accurate adjudication, since the nationwide average time between a request for a hearing and the ALJ's decision currently is 185 days. See *Wright* v. *Califano*, *supra*, 587 F.2d at 353. Cf. *Hodel* v. *Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264, 283 (1981); *Open America* v. *Watergate Special Prosecution Force*, 547 F.2d 605, 615 n.17 (D.C. Cir. 1976). If ALJs were induced to deny benefit claims because insufficient evidence had been obtained within the time allowed to support a finding of disability, the result could be to increase the burden on the courts under 42 U.S.C. 405(g) and actually to *lengthen* processing times, since a greater percentage of cases predictably would be remanded for further administrative proceedings following judicial review. And in an effort to meet the deadlines under the Title II disability program, the Secretary might be forced to divert scarce resources from other Social Security programs—such as Medicare or Old Age and Survivors Insurance—that are not subject to court-imposed time limitations.[38]

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[38] Although the judgment below directly concerns only the processing of claims in Vermont, an affirmance of that judgment by this Court no doubt would rapidly lead to a further proliferation of separate decrees imposing time limits in other jurisdictions. See, *e.g.*, cases cited at Pet. 13-15 & nn. 13, 14 & 16. This process

In sum, there is no basis for concluding that the Secretary has failed to afford claimants a "reasonable * * * opportunity for a hearing" within the meaning of 42 U.S.C. 405(b).

C. The Secretary's Scheduling of Hearings Does Not Violate The Administrative Procedure Act

The court of appeals, like the district court, did not address the question whether the timing of ALJ hearings violates the Administrative Procedure Act (APA), because it found that the timing violates 42 U.S.C. 405(b) (see Pet. App. 9a n.8, 15a, 26a). Moreover, respondents, in their Brief in Opposition, did not rely upon the APA in support of the judgment below. Nevertheless, we shall briefly address the APA here because it was relied upon by the First Circuit in *Caswell* v. *Califano*, *supra*, 583 F.2d at 15.[39]

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would further balkanize the administration of what Congress plainly intended to be a uniform, nationwide program (see 42 U.S.C. (Supp. V) 421(a)(2); *Heckler* v. *Campbell*, *supra*, slip op. 7-8) as the Secretary sought to comply with the varying terms of the decrees. See Pet. 17. In addition, if processing time limits were judicially imposed in some jurisdictions but not others, the Secretary would be required to meet the applicable deadlines by reallocating resources from SSA regions that were not yet under a judicial decree (as already has occurred in several cases (see Pet. 16 n.17)), thereby prejudicing the rights of claimants in some localities and undermining the goals of fairness and uniformity that are themselves important elements of a "reasonable * * * opportunity for a hearing." See *Wright* v. *Califano*, *supra*, 587 F.2d at 352-353; *Blankenship* v. *Secretary of HEW*, *supra*, 587 F.2d at 335; *Systemic Delays*, *supra*, 79 Colum. L. Rev. at 972; Goldman, *Administrative Delay and Judicial Relief*, 66 Mich. L. Rev. 1423, 1425 (1968). Even the First and Second Circuits have acknowledged the validity of the concern that "'if the Secretary's resources truly are inadequate to the task, the more litigious of the applicants may gain an advantage over the less assertive.'" Pet. App. 7a, quoting *Caswell* v. *Califano*, *supra*, 583 F.2d at 17.

[39] Respondents' contention below that the processing times violate the Due Process Clause is without merit in light of *Mathews* v. *Eldridge* and the 1980 and 1982 amendments to the Social Security Act providing added protection for individuals whose disability benefits are terminated.

The First Circuit found support for processing deadlines in two provisions of the APA: 5 U.S.C. 555(b) and 706(1).[40] The first states: "With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it." Under 5 U.S.C. 706(1), a reviewing court is authorized to "compel agency action unlawfully withheld or unreasonably delayed." As an initial matter, we submit that the timing of disability hearings that has been so firmly established by the joint action of Congress and the Secretary pursuant to the Social Security Act and that clearly satisfies the specific procedural requirements of that Act cannot be held to violate the generally applicable provisions of the APA. See *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 153 (1976). Cf. *Richardson* v. *Perales*, *supra*, 402 U.S. at 409-410. In any event, the cited provisions of the APA do not support the program-wide relief ordered by the courts below.

1. It is plain from the face of 5 U.S.C. 555(b) that the nature of an agency's obligation to conclude a matter must be informed by a "due regard for the convenience and necessity of the parties." And with particular relevance to the issue involved here, 5 U.S.C. 554(b) similarly provides that "[i]n fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives." Congress thus has recognized that the circumstances confronting a party—including the agency itself—may affect the timing of the hearing and decision. See S. Rep. No. 752, 79th Cong., 1st Sess. 17 (1945); 3 K. Davis, *Administrative Law Treatise* 52 (2d ed. 1980); U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 46 (1947) ("*Manual*") (scheduling of hearings must be consistent with the "due execution of the agency's functions").

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[40] We assume, for present purposes only, that these provisions of the APA apply to Social Security disability claims. See *Richardson* v. *Perales*, *supra*, 402 U.S. at 409.

In addition, the determination of what constitutes a "reasonable time" for purposes of 5 U.S.C. 555(b) must take into account more than the claimant's interest in a prompt disposition. Just as under 42 U.S.C. 405(b), it also is necessary to consider the reasons for the passage of time, the need to assure the quality of adjudication, and resource limitations under the particular program. See pages 33-37, *supra*. Accordingly, the language of 5 U.S.C. 554(b) and 555(b) refutes the suggestion that a violation of the APA is established by the mere passage of time prior to the holding of hearings under the disability program, when that situation results from the orderly processing of a vast number of cases pending before the agency within the limits of available resources, the ALJ's obligation to prepare each of his many pending cases carefully for its hearing,[41] and the need to coordinate the scheduling of hearings in various locations. Cf. *Morris* v. *Slappy*, No. 81-1095 (Apr. 20, 1983), slip op. 9 ("Trial judges necessarily require a great deal of latitude in scheduling trials").

The text of the judicial review provision in 5 U.S.C. 706(1), which authorizes a reviewing court to "compel agency action wrongfully withheld or unreasonably delayed," likewise does not furnish a basis for a court to impose program-wide deadlines on the adjudication of disability claims. There is no suggestion that ALJ hearings have been "wrongfully withheld" from the respondent class. Cf. *GTE Sylvania, Inc.* v. *Consumers Union*, 445 U.S. 375, 385-387 (1980). Nor can the hearings be said to have been "unreasonably delayed." The word "delay" connotes a deliberate postponement or retarding of a matter from its normal course.[42] The orderly disposition of the broad class of disability claims within the limits

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[41] At the end of May 1983, the average number of cases pending before each ALJ was 221, an all-time record. *Key Workload Indicators*, *supra* note 1, at 1.

[42] *Webster's Third New International Dictionary* 595 (4th ed. 1976).

of established procedures and existing resources does not fit this description. And even if the resulting passage of time could be said to constitute "delay," that delay, as we have explained, is not "unreasonable."

2. The legislative history of the APA is equally unsupportive of the judgment below, for it too "suggests that section 555(b) and 706(1) were designed to protect persons from an agency's intentional delay or 'dilatory attitude'" (*Systemic Delays*, *supra*, 79 Colum. L. Rev. at 965 n.30)—factors that concededly are not present here. The House Report explained that what is now 5 U.S.C. 555(b) means "that no agency shall in effect deny relief or fail to conclude a case by mere inaction, or proceed in dilatory fashion to the injury of the persons concerned. No agency should permit any person to suffer injurious consequences of unwarranted official delay." H.R. Rep. No. 1980, 79th Cong., 2d Sess. 32 (1946). See also S. Rep. No. 752, 79th Cong., 1st Sess. 19 (1945) ("no agency shall in effect deny relief or fail to conclude a case by mere inaction"). The nationwide processing of an average of more than 1.5 cases by each ALJ on each working day scarcely can be described as "mere inaction"[43] or proceeding in a "dilatory fashion." Nor, given the good faith efforts of the Secretary to improve productivity, is this a case of "unwarranted official delay."

Similarly, the legislative history of the APA described the predecessor to 5 U.S.C. 706(1) as "recogniz[ing] the right of properly interested parties to compel agencies to act where they improvidently refuse to act." H.R. Rep. No. 1980, *supra*, at 44; S. Rep. No. 752, *supra*, at 28. Here, however, the Secretary has not "refused" to decide disability cases (cf. *Costle* v. *Pacific Legal Foundation*, 445 U.S. 198, 220 n.14 (1980)) or acted "improvidently" in assuring a thorough and accurate evaluation of claims with full use of available resources.

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[43] Conducting the hearing itself is not the only "action" by the Secretary in these cases; the numerous steps that must be taken in preparation for the hearing (see pages 8-10, *supra*) dispel any suggestion of prolonged "inaction" in the interim.

It also is significant that the Attorney General's *Manual* on the APA [44] states that what is now 5 U.S.C. 706 (1) "appears to be a particularized restatement of existing judicial practice" in the issuance of writs of mandamus pursuant to the All Writs Act, 28 U.S.C. (1946 ed.) 377, now codified at 28 U.S.C. 1651. *Manual, supra*, at 108, citing, *inter alia*, *Roche* v. *Evaporated Milk Association*, 319 U.S. 21 (1943). Mandamus would not lie to compel a district judge to act on a particular case solely because of the passage of the time required by the judge and the parties to prepare the case and to bring it to trial in the normal course on the court's crowded docket. That relief would be available only if the court affirmatively and substantially departed from its normal course in the particular case—*i.e.*, if it "persistently and without reason refuse[d] to adjudicate a case properly before it" (*Will* v. *Calvert Fire Insurance Co.*, 437 U.S. 655, 661-662 (1978) (opinion of Rehnquist, J.). See also *Roche* v. *Evaporated Milk Association*, *supra*, 319 U.S. at 27 ("refusal" to adjudicate issues). It would, accordingly, be unthinkable for an appellate court, in granting mandamus relief, to require that *all* cases pending before a district judge be disposed of within a fixed time frame—at least absent the most exceptional circumstances. Although we do not suggest that mandamus doctrine is uniformly applicable to 5 U.S.C. 706(1), the Attorney General's contemporaneous interpretation of 5 U.S.C. 706(1) as a "particularized restatement" of mandamus principles at the very least weighs heavily against a reviewing court's exercising a comparably instrusive control over an agency's docket and its scheduling of cases for a hearing.

3. Thus, the text and legislative history of the APA do not support the ordering of program-wide deadlines absent a showing of pervasive bad faith. That Act was

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[44] This Court has given weight to the *Manual* in interpreting the APA because it embodies the contemporaneous construction of the Act by the Executive Department involved in its drafting. *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302 n.31 (1979); *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, *supra*, 435 U.S. at 546.

intended instead to furnish a more tailored remedy, available upon a party's showing that the handling of a particular case departs significantly from agency norms without justification, requires repetitive proceedings serving no legitimate agency purpose, or otherwise constitutes the effective equivalent of a deliberate and substantial postponement of action. See *Wright* v. *Califano*, *supra*, 587 F.2d at 352-353; *FTC* v. *J. Weingarten, Inc.*, 336 F.2d 687, 691-692 (5th Cir. 1964), cert. denied, 380 U.S. 908 (1965); *Deering-Milliken, Inc.* v. *Johnston*, 295 F.2d 856, 867-868 (4th Cir. 1961); Goldman, *supra*, 66 Mich. L. Rev. at 1429; *Systemic Delays*, *supra*, 79 Colum. L. Rev. at 966-968, 977-982; Note, *Judicial Acceleration of the Administrative Process: The Right To Relief from Unduly Protracted Proceedings*, 72 Yale L.J. 574-575 (1963). No such showing has been made here.

D. The Courts Below Erred In Extending Processing Deadlines To The Reconsideration Stage

Our submission that the courts below erred in imposing deadlines on the processing of claims at the ALJ hearing stage equally demonstrates that the courts were mistaken in extending processing deadlines to the reconsideration stage as well. As we have explained (see pages 19-31, *supra*), Congress consistently has declined to incorporate deadlines in the Act for *any* stage of the proceedings, including reconsideration, and instead has enacted statutory provisions and suggested solutions inconsistent with court-imposed deadlines.

The extension of deadlines to the reconsideration stage is particularly inappropriate in view of the fact that the reconsideration function is carried out by State agencies, whose day-to-day activities are not subject to the Secretary's direct control. To meet this problem, in the Disability Amendments of 1980, Congress authorized the Secretary to promulgate regulations specifying "in such detail as he deems appropriate" performance standards and procedures to be followed by the State agencies "in order to assure effective and uniform administration of

the disability program throughout the United States." 42 U.S.C. (Supp. V) 421(a)(2). These regulations "may," but need not, specify performance criteria for the accuracy of decisions and "the time periods within which determinations must be made" (42 U.S.C. (Supp. V) 421(a)(2)(C)). Moreover, Congress provided a specific means of enforcing these standards: it authorized the Secretary to assume the State's functions—after a 180-day waiting period—if she finds after a hearing that the State agency has failed to comply with the standards. 42 U.S.C. (Supp. V) 421(b). In the exercise of her discretion under this Section, the Secretary has elected to impose time limits on initial determinations by State agencies (20 C.F.R. 404.1640 *et seq.*), but not on reconsiderations. The Secretary's omission of fixed deadlines at the reconsideration stage plainly is not an abuse of discretion, in view of Congress' express reservations about the wisdom of deadlines. The court of appeals' imposition of processing deadlines directly on the State agencies therefore is at odds with the explicit congressional judgment to leave the question of such deadlines and their enforcement to the Secretary as part of her general oversight of the State's performance.[45]

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[45] Respondents complain (Br. in Opp. 4) of what they term "gaps of unexplained delay" in the processing of the 77 cases selected as a sample of reconsideration cases in Vermont (see page 12, *supra*). This complaint is based on a compilation of a log for each of the 77 sample cases that simply notes when certain discrete actions were taken in the particular case (*e.g.*, file requested from SSA by the State agency, file received, consultative examination requested, additional evidence requested, determination signed by State agency examiner or State agency physician, "systems input," etc.). See J.A. 105-149, 192-195. These summaries do not purport to explain what transpired *between* the particular milestones listed, the complexity of particular cases, or the caseload confronting the employees involved, and it simply is not possible to reconstruct those facts long after a case has been finally adjudicated. Such "gaps" in explanation by the agency, when considered with a presumption of regularity, do not show that the agency has performed in an unacceptable fashion. See *INS* v. *Miranda*, No. 82-29 (Nov. 8, 1982), slip op. 4. Far less do they carry respondents' burden of proving

Finally, the ability of a State agency to comply with the 90-day deadline adopted by the courts below—a figure based on the district court's review of cases reconsidered between 1977 and 1980—is rendered more doubtful by the provisions of the Disability Amendments of 1980 requiring new individualized notice and pre-effectuation review by SSA of State reconsideration decisions. And beginning no later than January 1, 1984, evidentiary hearings must be held at the reconsideration stage in disability termination cases, which obviously will add to the time needed at that stage. These legislative developments, which the processing deadlines imposed by the lower courts fail to accommodate, clearly illustrate the danger of judicial intervention in an area more appropriately designed for monitoring and regulation by Congress and the Secretary.

II. THE DISTRICT COURT WAS WITHOUT AUTHORITY TO ORDER THE PAYMENT OF INTERIM BENEFITS TO INDIVIDUALS WHOSE CLAIMS ARE NOT PROCESSED WITHIN THE JUDICIALLY IMPOSED DEADLINES

If, contrary to our submission in Point I, the district court properly imposed fixed deadlines on the completion of the reconsideration stage and the holding of ALJ hearings in Social Security disability cases, that court nevertheless was without authority to order the payment of interim benefits to individuals whose claims are not processed within those deadlines.

This Court repeatedly has stressed that "the United States, as sovereign, 'is immune from suit save as it consents to be sued * * * and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *Lehman* v. *Nakshian*, 453 U.S. 156, 160 (1981), quoting *United States* v. *Testan*,

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their entitlement to the extraordinary relief ordered below. Congress has now made clear that any defects in a State agency's administration of the disability program are for the Secretary to correct. 42 U.S.C. (Supp. V) 421(a) and (b).

424 U.S. 392, 399 (1976), and *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). Consistent with this principle, a court may not award monetary relief against the federal government absent a congressional enactment waiving the United States' sovereign immunity. *United States* v. *Mitchell*, No. 81-1748 (June 27, 1983), slip op. 6; *Army & Air Force Exchange Service* v. *Sheehan*, 456 U.S. 728, 738-740 (1982); *United States* v. *Testan*, *supra*; *Pine Hill Coal Co.* v. *United States*, 259 U.S. 191, 196 (1922). Cf. U.S. Const., Art. I, § 9, Cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law * * *").

The conditions for the payment of benefits from the Social Security Trust Funds are set forth in 42 U.S.C. 405(i). That Section permits payment only upon a "final decision" by the Secretary or "final judgment" by a court that a person is "entitled" to benefits. Under 42 U.S.C. (Supp. V) 423(a)(1), an individual is "entitled" to payment of disability insurance benefits only if he "is under a disability" and satisfies other eligibility criteria. Any member of the respondent class to whom interim disability benefits must be paid under the judgment below by definition will *not* have received the requisite "final decision" by the Secretary (or the State agency) establishing his eligibility. The interim benefit provisions of the judgment below therefore violate 42 U.S.C. 405(i).

In *Schweiker* v. *Hansen*, 450 U.S. 785 (1981), another Social Security case, this Court reiterated " 'the duty of all courts to observe the conditions defined by Congress for charging the public treasury.' " 450 U.S. at 788, quoting *Federal Crop Insurance Co.* v. *Merrill*, 332 U.S. 380 (1947). The court of appeals sought to avoid the force of *Hansen* by characterizing the interim benefits requirement as flowing from the "district court's inherent powers to fashion a remedy" (Pet. App. 8a). But, as we have said, the courts of the United States have no "inherent power" to order the payment of money from the federal Treasury whenever they find a violation of a statute. *United States* v. *Testan*, *supra*, 424 U.S. at 401,

403. Moreover, the remedy a court may fashion for a violation of the requirement in 42 U.S.C. 405(b) that an individual be provided "reasonable notice and opportunity for a hearing" surely is limited by the conditions on the payment of money from the Trust Funds contained in Subsection (i) of that same statutory provision. Compliance with those conditions is not excused by the mere passage of time in processing a claim. Cf. *INS* v. *Miranda*, No. 82-29 (Nov. 8, 1982).

In addition, the decision below ignores the fact that Congress has addressed the interim benefits issue and has chosen not to make such benefits generally available in disability cases solely because of the passage of time in the administrative review process. As we have explained (see page 22, *supra*), Congress enacted 42 U.S.C. 405(q) in 1968 to provide a mechanism for the expedited payment of benefits when a claim has not been finally resolved within a specified period but the claimant has made a prima facie showing of entitlement. The Senate Report explicitly stated, however, that "the Secretary should not be forced into making doubtful payments merely because of the passage of time" and that Section 405(q) therefore requires the Secretary to be "confident of the validity of the claim" before an interim payment may be made. S. Rep. No. 744, *supra*, at 106. What is more, Congress expressly excluded *disability* cases from this expedited payment provision (42 U.S.C. 405(q)(5)) because State agencies are involved in the process, "lengthy and extensive development of facts of a medical nature is often required," and "the Secretary should be reluctant to make a favorable ruling of basic eligibility in the disability area on the basis of partial evidence" (S. Rep. No. 744, *supra*, at 107). The award of interim benefits by the courts below countermands this deliberate legislative judgment.[46]

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[46] Even in situations not implicating sovereign immunity, where the federal courts may have greater "power to grant relief that is not expressly authorized by statute," the Court has stressed that "such power is to be exercised in light of relevant policy determinations made by the Congress." *Bush* v. *Lucas*, No. 81-469 (June 13, 1983), slip op. 6.

In 1982, Congress did enact *temporary* authorization for the payment of interim benefits through the ALJ stage to an individual whose benefits are to be terminated on the basis of a decision by the State agency that he no longer is under a disability. See page 4, *supra*. This provision was enacted because of Congress' special concern that individuals who may have become dependent upon their disability benefits might experience hardship while they pursue administrative review of the State's termination decision. See materials cited in note 35, *supra*. Any member of the respondent class covered by this provision of course may receive benefits under it. But because Congress has demonstrated that when it intends to allow payment of interim benefits pending administrative review it has expressly so provided, it is now especially clear that the award of interim benefits to other persons—such as those whose new applications for disability benefits have been denied by the State agency—is barred by the Act.[47] The district court's interim benefits order therefore cannot stand.[48]

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[47] In fact, the 1982 legislation permitting interim benefit payments only in termination cases was enacted on the basis of Congress' understanding that "[p]resent law does not authorize the payment of Social Security benefits from the Social Security trust funds until a final decision is made on an application for benefits" and its disagreement with judicial decisions requiring payment of interim benefits in disability cases generally. H.R. Rep. No. 97-588, *supra*, at 19. See also note 36, *supra*.

[48] Although the district court's order permits recoupment of the interim benefits if the claimant is later found to be ineligible (Pet. App. 35a), this "theoretical right of the Secretary to recover undeserved benefits [would not] result, as a practical matter, in any substantial offset to the added outlay of public funds." *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 347.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

STATUTORY PROVISIONS INVOLVED

A. SOCIAL SECURITY PROVISIONS:

1. Section 308 of the Social Security Disability Amendment of 1980, Pub. L. No. 96-265, 94 Stat. 458, 42 U.S.C. (Supp. V) 401 note, provides:

> TIME LIMITATIONS FOR DECISIONS ON BENEFIT CLAIMS
>
> SEC. 308. The Secretary of Health and Human Services shall submit to the Congress, no later than July 1, 1980, a report recommending the establishment of appropriate time limitations governing decisions on claims for benefits under title II of the Social Security Act. Such report shall specifically recommend—
>
> (1) the maximum period of time (after application for a payment under such title is filed) within which the initial decision of the Secretary as to the rights of the applicant should be made;
>
> (2) the maximum period of time (after application for reconsideration of any decision described in paragraph (1) is filed) within which a decision of the Secretary on such reconsideration should be made;
>
> (3) the maximum period of time (after a request for a hearing with respect to any decision described in paragraph (1) is filed) within which a decision of the Secretary upon such hearing (whether affirming, modifying, or reversing such decision) should be made; and
>
> (4) the maximum period of time (after a request for review by the Appeals Council with respect to any decision described in paragraph (1) is made) within which the decision of the Secretary upon such review (whether affirming, modifying, or reversing such decision) should be made.

In determining the time limitations to be recommended, the Secretary shall take into account both the need for expeditious processing of claims for benefits and the need to assure that all such claims will be thoroughly considered and accurately determined.

2. Section 205 of the Social Security Act, as codified at 42 U.S.C. (& Supp. V) 405, provides in relevant part:

§ 405. Evidence, procedure, and certification for payments

(a) Rules and regulations; procedures

The Secretary shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder.

(b) Administrative determination of entitlement to benefits statement; findings of fact; hearings; investigations

[(1)*] The Secretary is directed to make findings of fact, and decisions as to the rights of any indi-

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* In Section 4(a) of Pub. L. No. 97-455, 96 Stat. 2499, Congress amended Section 205(b) of the Act by inserting "(1)" before the text of Subsection (b) as it then read and adding at the end of Subsection (b) a new paragraph (2), which is set off here in brackets because it has not yet been codified at 42 U.S.C. 405(b). Section 4(b) of Pub. L. No. 97-455, 96 Stat. 2500, provides that these amendments to Section 205(b) of the Act shall apply to any request for reconsideration made on or after such date as the Secretary may specify, but in any event no later than January 1, 1984.

vidual applying for a payment under this subchapter. Any such decision by the Secretary which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Secretary's determination and the reason or reasons upon which it is based. Upon request by any such individual or upon request by a wife, divorced wife, widow, surviving divorced wife, surviving divorced mother, husband, widower, child, or parent who makes a showing in writing that his or her rights may be prejudiced by any decision the Secretary has rendered, he shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse his findings of fact and such decision. Any such request with respect to such a decision must be filed within sixty days after notice of such decision is received by the individual making such request. The Secretary is further authorized, on his own motion, to hold such hearings and to conduct such investigations and other proceedings as he may deem necessary or proper for the administration of this subchapter. In the course of any hearing, investigation, or other proceeding, he may administer oaths and affirmations, examine witnesses, and receive evidence. Evidence may be received at any hearing before the Secretary even though inadmissible under rules of evidence applicable to court procedure.

[(2) In any case where—

(A) an individual is a recipient of disability insurance benefits, or of child's, widow's, or widower's insurance benefits based on disability,

(B) the physical or mental impairment on the basis of which such benefits are payable is found

to have ceased, not to have existed, or to no longer be disabling, and

(C) as a consequence of the finding described in subparagraph (B), such individual is determined by the Secretary not to be entitled to such benefits,

any reconsideration of the finding described in subparagraph (B), in connection with a reconsideration by the Secretary (before any hearing under paragraph (1) on the issue of such entitlement) of his determination described in subparagraph (C), shall be made only after opportunity for an evidentiary hearing, with regard to the finding described in subparagraph (B), which is reasonably accessible to such individual. Any reconsideration of a finding described in subparagraph (B) may be made either by the State agency or the Secretary where the finding was originally made by the State agency, and shall be made by the Secretary where the finding was originally made by the Secretary. In the case of a reconsideration by a State agency of a finding described in subparagraph (B) which was originally made by such State agency, the evidentiary hearing shall be held by an adjudicatory unit of the State agency other than the unit that made the finding described in subparagraph (B). In the case of a reconsideration by the Secretary of a finding described in subparagraph (B) which was originally made by the Secretary, the evidentiary hearing shall be held by a person other than the person or persons who made the finding described in subparagraph (B).]

• • • • •

(i) Certification for payment

Upon final decision of the Secretary or upon final judgment of any court of competent jurisdiction, that any person is entitled to any payment or payments under this subchapter, the Secretary shall certify to

the Managing Trustee the name and address of the person so entitled to receive such payment or payments, the amount of such payment or payments, and the time at which such payment or payments should be made, and the Managing Trustee, through the Division of Disbursement of the Treasury Department, and prior to any action thereon by the General Accounting Office, shall make payment in accordance with the certification of the Secretary * * *: *Provided*, That where a review of the Secretary's decision is or may be sought under subsection (g) of this section the Secretary may withhold certification of payment pending such review. The Managing Trustee shall not be held personally liable for any payment or payments made in accordance with a certification by the Secretary.

* * * * *

(q) Expedited benefit payments

(1) The Secretary shall establish and put into effect procedures under which expedited payment of monthly insurance benefits under this subchapter will, subject to paragraph (4) of this subsection, be made as set forth in paragraphs (2) and (3) of this subsection.

(2) In any case in which—

(A) an individual makes an allegation that a monthly benefit under this subchapter was due him in a particular month but was not paid to him, and

(B) such individual submits a written request for the payment of such benefit—

(i) in the case of an individual who received a regular monthly benefit in the month preceding the month with respect to which such allegation is made, not less than 30 days after the 15th day of the month with respect to which such allegation is

made (and in the event that such request is submitted prior to the expiration of such 30-day period, it shall be deemed to have been submitted upon the expiration of such period), and

(ii) in any other case not less than 90 days after the later of (I) the date on which such benefit is alleged to have been due, or (II) the date on which such individual furnished the last information requested by the Secretary (and such written request will be deemed to be filed on the day on which it was filed, or the ninetieth day after the first day on which the Secretary has evidence that such allegation is true, whichever is later),

the Secretary shall, if he finds that benefits are due, certify such benefits for payment, and payment shall be made within 15 days immediately following the date on which the written request is deemed to have been filed.

(3) In any case in which the Secretary determines that there is evidence, although additional evidence might be required for a final decision, that an allegation described in paragraph (2)(A) is true, he may make a preliminary certification of such benefit for payment even though the 30-day or 90-day periods described in paragraph (2)(B)(i) and (B)(ii) have not elapsed.

(4) Any payment made pursuant to a certification under paragraph (3) of this subsection shall not be considered an incorrect payment for purposes of determining the liability of the certifying or disbursing officer.

(5) For purposes of this subsection, benefits payable under section 428 of this title shall be treated as monthly insurance benefits payable under this subchapter. However, this subsection shall not apply

with respect to any benefit for which a check has been negotiated, or with respect to any benefit alleged to be due under either section 423 of this title, or section 402 of this title to a wife, husband, or child of an individual entitled to or applying for benefits under section 423 of this title, or to a child who has attained age 18 and is under a disability, or to a widow or widower on the basis of being under a disability.

3. Section 221 of the Social Security Act, as codified at 42 U.S.C. (Supp. V) 421, provides in relevant part:

§ 421. Disability determinations

(a) State agencies

(1) In the case of any individual, the determination of whether or not he is under a disability (as defined in section 416(i) or 423(d) of this title) and of the day such disability began, and the determination of the day on which such disability ceases, shall be made by a State agency, notwithstanding any other provision of law, in any State that notifies the Secretary in writing that it wishes to make such disability determinations commencing with such month as the Secretary and the State agree upon, but only if (A) the Secretary has not found, under subsection (b)(1) of this section, that the State agency has substantially failed to make disability determinations in accordance with the applicable provisions of this section or rules issued thereunder, and (B) the State has not notified the Secretary, under subsection (b)(2) of this section, that it does not wish to make such determinations. If the Secretary once makes the finding described in clause (A) of the preceding sentence, or the State gives the notice referred to in clause (B) of such sentence, the Secretary may thereafter determine whether (and, if so, beginning with which month and under what condi-

tions) the State may again make disability determinations under this paragraph.

(2) The disability determinations described in paragraph (1) made by a State agency shall be made in accordance with the pertinent provisions of this subchapter and the standards and criteria contained in regulations or other written guidelines of the Secretary pertaining to matters such as disability determinations, the class or classes of individuals with respect to which a State may make disability determinations (if it does not wish to do so with respect to all individuals in the State), and the conditions under which it may choose not to make all such determinations. In addition, the Secretary shall promulgate regulations specifying, in such detail as he deems appropriate, performance standards and administrative requirements and procedures to be followed in performing the disability determination function in order to assure effective and uniform administration of the disability insurance program throughout the United States. The regulations may, for example, specify matters such as—

(A) the administrative structure and the relationship between various units of the State agency responsible for disability determinations,

(B) the physical location of and relationship among agency staff units, and other individuals or organizations performing tasks for the State agency, and standards for the availability to applicants and beneficiaries of facilities for making disability determinations,

(C) State agency performance criteria, including the rate of accuracy of decisions, the time periods within which determinations must be made, the procedures for and the scope of review by the Secretary, and, as he finds appropriate, by the State, of its performance in individual cases and in classes of cases, and rules

governing access of appropriate Federal officials to State offices and to State records relating to its administration of the disability determination function,

(D) fiscal control procedures that the State agency may be required to adopt, and

(E) the submission of reports and other data, in such form and at such time as the Secretary may require, concerning the State agency's activities relating to the disability determination.

Nothing in this section shall be construed to authorize the Secretary to take any action except pursuant to law or to regulations promulgated pursuant to law.

(b) Determinations by Secretary

(1) If the Secretary finds, after notice and opportunity for a hearing, that a State agency is substantially failing to make disability determinations in a manner consistent with his regulations and other written guidelines, the Secretary shall, not earlier than 180 days following his finding, and after he has complied with the requirements of paragraph (3), make the disability determinations referred to in subsection (a)(1) of this section.

(2) If a State, having notified the Secretary of its intent to make disability determinations under subsection (a)(1) of this section, no longer wishes to make such determinations, it shall notify the Secretary in writing of that fact, and, if an agency of the State is making disability determinations at the time such notice is given, it shall continue to do so for not less than 180 days, or (if later) until the Secretary has complied with the requirements of paragraph (3). Thereafter, the Secretary shall make the disability determinations referred to in subsection (a)(1) of this section.

(3)(A) The Secretary shall develop and initiate all appropriate procedures to implement a plan with respect to any partial or complete assumption by the Secretary of the disability determination function from a State agency, as provided in this section, under which employees of the affected State agency who are capable of performing duties in the disability determination process for the Secretary shall, notwithstanding any other provision of law, have a preference over any other individual in filling an appropriate employment position with the Secretary (subject to any system established by the Secretary for determining hiring priority among such employees of the State agency) unless any such employee is the administrator, the deputy administrator, or assistant administrator (or his equivalent) of the State agency, in which case the Secretary may accord such priority to such employee.

(B) The Secretary shall not make such assumption of the disability determination function until such time as the Secretary of Labor determines that, with respect to employees of such State agency who will be displaced from their employment on account of such assumption by the Secretary and who will not be hired by the Secretary to perform duties in the disability determination process, the State has made fair and equitable arrangements to protect the interests of employees so displaced. Such protective arrangements shall include only those provisions which are provided under all applicable Federal, State and local statutes including, but not limited to, (i) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective-bargaining agreements; (ii) the continuation of collective-bargaining rights; (iii) the assignment of affected employees to other jobs or to retraining programs; (iv) the protection of individual employees against a worsening of their positions with respect to their employment;

(v) the protection of health benefits and other fringe benefits; and (vi) the provision of severance pay, as may be necessary.

(c) Review of determination by Secretary

(1) The Secretary may on his own motion or as required under paragraphs (2) and (3) review a determination, made by a State agency under this section, that an individual is or is not under a disability (as defined in section 416(i) or 423(d) of this title) and, as a result of such review, may modify such agency's determination and determine that such individual either is or is not under a disability (as so defined) or that such individual's disability began on a day earlier or later than that determined by such agency, or that such disability ceased on a day earlier or later than that determined by such agency. A review by the Secretary on his own motion of a State agency determination under this paragraph may be made before or after any action is taken to implement such determination.

(2) The Secretary (in accordance with paragraph (3)) shall review determinations, made by State agencies pursuant to this section, that individuals are under disabilities (as defined in section 416(i) or 423(d) of this title). Any review by the Secretary of a State agency determination under this paragraph shall be made before any action is taken to implement such determination.

(3) In carrying out the provisions of paragraph (2) with respect to the review of determinations, made by State agencies pursuant to this section, that individuals are under disabilities (as defined in section 416(i) or 423(d) of this title), the Secretary shall review—

(A) at least 15 percent of all such determinations made by State agencies in the fiscal year 1981,

(B) at least 35 percent of all such determinations made by State agencies in the fiscal year 1982, and

(C) at least 65 percent of all such determinations made by State agencies in any fiscal year after the fiscal year 1982.

(d) Hearings and judicial review

Any individual dissatisfied with any determination under subsection (a), (b), (c), or (g) of this section shall be entitled to a hearing thereon by the Secretary to the same extent as is provided in section 405(b) of this title with respect to decisions of the Secretary's final decision after such hearing as is provided in section 405(g) of this title.

* * * * *

(h) [*] Periodic reviews of eligibility

[(1)**] In any case where an individual is or has been determined to be under a disability, the case shall be reviewed by the applicable State agency or the Secretary (as may be appropriate), for purposes of continuing eligibility, at least once every 3 years[, subject to paragraph (2)]; except that where a finding has been made that such disability is permanent, such reviews shall be made at such times as the Secretary determines to be appropriate. Reviews of cases under the preceding sentence shall be in addition to, and shall not be considered as a substitute for, any other reviews which are required or pro-

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* Section 221(i) was editorially designated as Subsection (h) of 42 U.S.C. (Supp. V) 421 because no Subsection (h) of Section 221 of the Act was enacted. See 42 U.S.C. (Supp. V) 421 note.

** In Section 3 of Pub. L. No. 97-455, 96 Stat. 2499, Congress amended Section 221(i) by inserting "(1)" before the text of Subsection (i) as it then read and adding at the end of Subsection (i) a new paragraph (2), which is set off in brackets here because it has not yet been codified at 42 U.S.C. 421(h). See note *, *supra*.

vided for under or in the administration of this subchapter.

[(2) The requirement of paragraph (1) that cases be reviewed at least every 3 years shall not apply to the extent that the Secretary determines, on a State-by-State basis, that such requirement should be waived to insure that only the appropriate number of such cases are reviewed. The Secretary shall determine the appropriate number of cases to be reviewed in each State after consultation with the State agency performing such reviews, based upon the backlog of pending reviews, the projected number of new applications for disability insurance benefits, and the current and projected staffing levels of the State agency, but the Secretary shall provide for a waiver of such requirement only in the case of a State which makes a good faith effort to meet proper staffing requirements for the State agency and to process case reviews in a timely fashion. The Secretary shall report annually to the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives with respect to the determinations made by the Secretary under the preceding sentence.]

4. Section 304(g) of the Social Security Disability Amendments of 1980, Pub. L. No. 96-265, 94 Stat. 456, 42 U.S.C. (Supp. V) 421 note, provides:

> The Secretary of Health and Human Services shall implement a program of reviewing, on his own motion, decisions rendered by administrative law judges as a result of hearings under section 221(d) of the Social Security Act, and shall report to the Congress by January 1, 1982, on his progress.

5. Section 223 of the Social Security Act, as codified at 42 U.S.C. (& Supp. V) 423, provides in relevant part:

§ 423. Disability insurance benefits payments

(a) Disability insurance benefits

(1) Every individual who—

(A) is insured for disability insurance benefits (as determined under subsection (c)(1) of this section),

(B) has not attained the age of sixty-five,

(C) has filed application for disability insurance benefits, and

(D) is under a disability (as defined in subsection (d) of this section)

shall be entitled to a disability insurance benefit (i) for each month beginning with the first month after his waiting period (as defined in subsection (c)(2) of this section) in which he becomes so entitled to such insurance benefits, or (ii) for each month beginning with the first month during all of which he is under a disability and in which he becomes so entitled to such insurance benefits, but only if he was entitled to disability insurance benefits which terminated, or had a period of disability (as defined in section 416(i) of this title) which ceased, within the 60-month period preceding the first month in which he is under such disability, and ending with the month preceding whichever of the following months is the earliest: the month in which he dies, the month in which he attains age 65, or, subject to subsection (e) of this section, the termination month. * * *.

* * * * *

[(g) Continued payment of disability benefits durduring appeal

(1) In any case where—

(A) an individual is a recipient of disability insurance benefits, or of child's, widow's, or widower's insurance benefits based on disability,

(B) the physical or mental impairment on the basis of which such benefits are payable is found to have ceased, not to have existed, or to no longer be disabling, and as a consequence such individual is determined not to be entitled to such benefits, and

(C) a timely request for a hearing under section 221(d), or for an administrative review prior to such hearing, is pending with respect to the determination that he is not so entitled,

such individual may elect (in such manner and form and within such time as the Secretary shall by regulations prescribe) to have the payment of such benefits, and the payment of any other benefits under this Act based on such individual's wages and self-employment income (including benefits under title XVIII), continued for an additional period beginning with the first month beginning after the date of the enactment of this subsection for which (under such determination) such benefits are no longer otherwise payable, and ending with the earlier of (i) the month preceding the month in which a decision is made after such a hearing, (ii) the month preceding the month in which no such request for a hearing or an administrative review is pending, or (iii) June 1984.

(2)(A) If any individual elects to have the payment of his benefits continued for an additional period under paragraph (1), and the final decision of the Secretary affirms the determination that he is not entitled to such benefits, any benefits paid under this title pursuant to such election (for months in such additional period) shall be considered overpayments for all purposes of this title, except as otherwise provided in subparagraph (B).

(B) If the Secretary determines that the individual's appeal of his termination of benefits was made

in good faith, all of the benefits paid pursuant to such individual's election under paragraph (1) shall be subject to waiver consideration under the provisions of section 204.

(3) The provisions of paragraphs (1) and (2) shall apply with respect to determinations (that individuals are not entitled to benefits) which are made—

(A) on or after the date of enactment of this subsection, or prior to such date but only on the basis of a timely request for a hearing under section 221(d), or for an administrative review prior to such hearing, and

(B) prior to October 1, 1983.*].

6. Section 1631(c) of the Social Security Act, as codified at 42 U.S.C. (& Supp. V) 1383(c), provides:

§ 1383. Procedure for payment of benefits

* * * * *

(c) Hearing to determine eligibility or amount of benefits; time within which to request hearing; time for determinations of Secretary pursuant to hearing; judicial review

(1) The Secretary is directed to make findings of fact, and decisions as to the rights of any individual applying for payment under this subchapter. Any such decision by the Secretary which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Secretary's determination and the reason or reasons upon which it is based. The Secretary shall provide reasonable notice and opportunity for a

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*** In Section 2 of the Pub. L. No. 97-455, 96 Stat. 2498-2499, Congress amended Section 223 of the Act by adding at the end thereof a new Subsection (g), which is set off in brackets here because it has not yet been codified at 42 U.S.C. 423(g).**

hearing to any individual who is or claims to be an eligible individual or eligible spouse and is in disagreement with any determination under this subchapter with respect to eligibility of such individual for benefits, or the amount of such individual's benefits, if such individual requests a hearing on the matter in disagreement within sixty days after notice of such determination is received, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing affirm, modify, or reverse his findings of fact and such decision. The Secretary is further authorized, on his own motion, to hold such hearings and to conduct such investigations and other proceedings as he may deem necessary or proper for the administration of this subchapter. In the course of any hearing, investigation, or other proceeding, he may administer oaths and affirmations, examine witnesses, and receive evidence. Evidence may be received at any hearing before the Secretary even though inadmissible under the rules of evidence applicable to court procedure.

(2) Determination on the basis of such hearing, except to the extent that the matter in disagreement involves a disability (within the meaning of section 1382c(a)(3) of this title), shall be made within ninety days after the individual requests the hearing as provided in paragraph (1).

(3) The final determination of the Secretary after a hearing under paragraph (1) shall be subject to judicial review as provided in section 405(g) of this title to the same extent as the Secretary's final determinations under section 405 of this title.

B. ADMINISTRATIVE PROCEDURE ACT:

1. 5 U.S.C. 554(b) provides:

§ 554. Adjudication

* * * * *

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

2. 5 U.S.C. 555(b) provides:

§ 555. **Ancillary matters**

* * * * *

(b) A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. **This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.**

3. 5 U.S.C. 706 provides:

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

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No. 82-1371

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

MARGARET M. HECKLER,
SECRETARY OF HEALTH AND HUMAN SERVICES,
PETITIONER

v.

LEON S. DAY, ET AL.,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

(1) Whether unjustified delays in obtaining Social Security Disability Insurance reconsideration decisions and face-to-face hearings violated respondents' rights under the Social Security Act to have an opportunity for a hearing within a reasonable time.

(2) Whether the district court abused its discretion in ordering that respondents' right to reasonably prompt action be protected by requiring adherence in Vermont to carefully crafted objective time standards with specified exeptions to measure the reasonableness of the delays.

(3) Whether the district court abused its equitable powers to enforce its order by requiring prospective monthly payments to respondents whose rights under the Act and order were violated, beginning at the earliest with the month after the order was violated, and ending with the month the delayed reconsideration decision or hearing was provided.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 10

ARGUMENT 12

I. THE COURTS BELOW CORRECTLY DECIDED THAT, ON THE RECORD BEFORE THEM, RESPONDENTS RIGHTS TO DECISIONS ON THEIR CLAIMS FOR SOCIAL SECURITY DISABILITY INSURANCE BENEFITS WERE VIOLATED BY UNREASONABLE DELAYS 12

A. The Social Security Act Requires That All Appeals Be Decided Within A Reasonable Time 12

B. The Delays Encountered By Respondents, Being Unrelated To Proper Case Development Needs, Were Unreasonable As a Matter Of Law 19

II. THE TIME LIMITS ORDERED BY THE DISTRICT COURT ARE A BALANCED AND APPROPRIATE REMEDY THAT CURES THE VIOLATIONS OF RESPONDENTS' RIGHTS WITHOUT OVERBURDENING THE PROCESSES OF THE SECRETARY 30

A. The Time Limits Allow For The Timely And Accurate Processing Of Disability Cases 30

B. The Time Limits Are Entirely Consistent With The Social Security Act 35

C. The Time Limits Are Appropriate In Light of Congressional Oversight Activity 39

III. PROSPECTIVE INTERIM PAYMENTS REPRESENT A LEGITIMATE EXERCISE OF A COURT'S POWER TO INSURE THAT ITS ORDER IS OBEYED AND TO PROVIDE SOME RELIEF TO WRONGED DISABILITY CLAIMANTS 43

CONCLUSION 50

APPENDIX 00

TABLE OF AUTHORITIES

Cases:

Alexander v. Hill, 707 F.2d 780 (4th Cir. 1983), *pet. for cert. pending sub nom. Syria v. Alexander*, No. 83-163 45

American Paper Institute, Inc. v. American Electric Power Service Corp., ___ U.S. ___, 76 L. Ed. 2d 22, 51 U.S.L.W. 4547 (1983) 16

Armstrong v. Manzo, 380 U.S. 545 (1965) 20

Army & Air Exchange Service v. Sheehan, 456 U.S. 728 (1982) 49

Atlantic Refining Co. v. Public Service Com'n of N.Y., 360 U.S. 378 (1959) 17

Barker v. Wingo, 407 U.S. 514 (1972) 20, 21

Barnett v. Califano, 580 F.2d 28 (2d Cir. 1978) 8, 21, 29, 38, 45, 46

Blankenship v. Sec'y of HEW, 587 F.2d 329 (6th Cir. 1978) 19, 21, 29, 34

Blankenship v. Sec'y of HHS, 517 F. Supp. 77 (W.D. Ky. 1981) 34

Blankenship v. Sec'y of HHS ,532 F. Supp. 739 (W.D. Ky. 1982) 34, 41, 45

Bob Jones University v. United States,___ U.S. ___, 76 L.2d 157, 51 U.S.L.W. 4593 (1983) 48

Bush v. Lucas,___ U.S. ___, 76 L. Ed. 2d 648, 51 U.S.L.W. 4752 (1983) 36

Califano v. Yamasaki 442 U.S. 682 1979) 16, 36, 45

California Dep't. of Human Resources Development v. Java, 402 U.S. 121 (1971) 17, 22, 27

Caswell v. Califano, 583 F.2d 9 (1st Cir. 1978) 19, 21, 29

Chagnon v. Schweiker, 560 F. Supp. 71 (D.Vt. 1982) 28

Costle v. Pacific Legal Foundation, 445 U.S. 198 (1980) 20

Crosby v. SSA, 550 F. Supp. 1278 (D. Mass. 1982) 21, 45

Dandridge v. Williams, 397 U.S. 471 (1970) 19

Davidson v. Gardner, 370 F.2d 803 (6th Cir. 1966) 16

Deering Milliken, Inc. v. Johnston, 295 F.2d 856 (4th Cir. 1961) 19, 21

Dousewicz v. Harris, 646 F.2d 771 (2d Cir. 1981) 16

Edelman v. Jordan, 415 U.S. 651 (1974) 48, 49

Ex parte Young, 209 U.S. 123 (1908) 49

Florida Dept. of State v. Treasure Salvors, ___ U.S. ___, 73 L. Ed 2d 1057, 50 U.S.L.W. 5056 (1982) 48

FPC v. Hunt, 376 U.S. 515 (1964) 29

Fusari v. Steinberg, 419 U.S. 379 (1975) 10, 11, 16, 17, 20, 22, 27, 28

Girouard v. United States, 328 U.S. 61 (1946) ... 39

Goldberg v. Kelly, 397 U.S. 254 (1970) 24, 28, 47, 49

Graham v. Richardson, 403 U.S. 365 (1971) 49

Haberman v. Finch 418 F.2d 664 (2d Cir. 1969) 16

Hecht Co. v. Bowles, 321 U.S. 321 (1944 ..... 36, 45

Hutto v. Finney, 437 U.S. 678 (1978) 36

INS v. Chadha, ___ U.S. ___, 77 L. Ed. 2d 317, 51 U.S.L.W. 4907 (1983) 21, 40

INS v. Miranda, ___ U.S. ___, 74 L. Ed. 2d 12 (1983) 49

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 37

J. I. Case Co. v. Borak, 377 U.S. 426 (1964)..... 45

Lehman v. Nakshian, 453 U.S. 156 (1981)..... 37

Lorillard v. Pons, 434 U.S. 575 (1978)..... 39

Mathews v. Eldridge, 424 U.S. 319 (1976)..... 18, 20, 24, 28, 46

Merrill Lynch, Pierce, Fenner and Smith v. Curran, 456 U.S. 353 (1982)..... 39, 47

Milliken v. Bradley, 433 U.S. 267 (1977)..... 49

Mitchell v. DeMario Jewelry, Inc. 361 U.S. 288 (1960)..... 36

Monaco v. Mississippi, 292 U.S. 313 (1934)..... 48

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., ___U.S.___, 77 L. Ed. 2d 443, 51 U.S.L.W. 4953 (1983)..... 33

New York State Association for Retarded Children v. Carey, 706 F.2d 956 (2d Cir. 1983)..... 30

New York Telephone Co. v. New York State Dep't. of Labor, 440 U.S. 519 (1979)..... 13

NLRB v. Rutter-Rex Mfg. Co., 396 U.S. 258, (1969)..... 29

Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294 (1933)..... 16

Porter v. Warner Holding Co., 328 U.S. 395 (1946)..... 36

Quern v. Jordan, 440 U.S. 332 (1979)..... 49

Richardson v. Perales, 402 U.S. 389 (1971)..... 16, 24

Rodriquez v. Swank, 496 F. 2d 1110 (7th Cir. 1974), cert. denied 419 U.S. 885 (1974)..... 43, 45

Safeway Stores, Inc. v. Brown, 138 F.2d 278 (E.C.A. 1943), *cert. denied*, 320 U.S. 797 (1943) ... 19

Schweiker v. Gray Panthers, 453 U.S. 34 (1981).. 19

Schweiker v. Hansen, 450 U.S. 785 (1981)..... 26

Smith v. Miller, 665 F.2d 172 (7th Cir. 1981) 21, 45

United States v. Eight Thousand Eight Hundred and Fifty Dollars, ___ U.S. ___, 76 L. Ed. 2d 143, 51 U.S.L.W. 4587 (1983) 20

United States v. Erika, Inc. 456 U.S. 201 (1982) 37

United States v. Mitchell, ___U.S.___, 77 L. Ed. 2d 580, 51 U.S.L.W. 4999 (1983) 49

United States v. Silk, 331 U.S. 704 (1947) 16

United States v. Testan, 424 U.S. 392 (1976) 49

United States v. United Mine Workers of America, 330 U.S. 258 (1947) 45

Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982) 36

White v. Mass. Council of Constr. Employers, ___ U.S. ___, 75 L.Ed. 2d 1, 51 U.S.L.W. 4211 (1983) 26

White v. Mathews, 559 F.2d 852 (2d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978) 12, 21, 29, 40, 45, 46

White v. Mathews, 434 F. Supp. 1252 (D. Conn. 1976) 20

Williams v. Schweiker, 541 F. Supp. 1360 (E.D. Mo. 1982 21

Williams v. Schweiker, 562 F. Supp. 149 (E.D. Mo. 1982) 45

Wright v. Califano, 587 F.2d 345 (7th Cir. 1978) 19, 21

Constitution, statutes and regulations:

U.S. Constitution

Art.II, §3, cl. 4 40

Federal Statutes:

5 U.S.C. §555 19
5 U.S.C. §706 (1) 19
42 U.S.C. §405(b) ..... *passim*
42 U.S.C. §405(g) 2
42 U.S.C. §405(i) 46
42 U.S.C. §405(q) 38, 46
42 U.S.C. §416(i) 27
42 U.S.C. §421 ..... 2, 25
42 U.S.C. §423(a) 2
42 U.S.C. §423(a)(l) 46
42 U.S.C. §423(c) 2
42 U.S.C. §423(d) 2, 27
42 U.S.C. §423(g) 47
42 U.S.C. §503 ..... 16, 17
42 U.S.C. §1383(a)(4)(B) 38
42 U.S.C. §1383(c)(2) 37
Pub. L. No. 96-265, 94 Stat. 441 *et seq.* 40
Pub. L. No. 97-455, 96 Stat. 2497
et seq. 18, 29, 34, 39, 47
70 Stat. 815 2

Federal Regulations and Court Rules:

20 C.F.R. §404.900(a)(5) 3
20 C.F.R. §404.904 3
20 C.F.R. §404.929 3
20 C.F.R. §404.941 26
20 C.F.R. §404.944 26
20 C.F.R. §404.967 3
20 C.F.R. §404.1640 25
20 C.F.R. §404.1642 25
45 C.F.R. §205.10(a)(11)(1972) 38
45 C.F.R. §205.10(a)(16)(1982) 38
Fed. R. Civ. P. 60(b) 30
Supreme Court Rule 21.1 19
Supreme Court Rule 34.1(a) 19

State Regulations:

Vermont Dept. of Social Welfare,
WELFARE ASSISTANCE MANUAL §2611 28

Vermont Dept. of Social Welfare,
WELFARE ASSISTANCE MANUAL §2618.1 ... 28

Miscellaneous:

A. Altmeyer, *The Formative Years of Social Security* (1966) 13

Administration of Social Security Disability Insurance Program, Hearings Before the Subcomm. on the Administration of the Social Security Laws of the Comm. on Ways and Means, 86th Cong., 1st Sess. (1959) 16

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1371

MARGARET M. HECKLER,
SECRETARY OF HEALTH AND HUMAN SERVICES,
PETITIONER

v.

LEON S. DAY, ET AL.,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS

STATEMENT OF THE CASE

When claimants appeal adverse initial determinations that they are not entitled to Social Security disability insurance benefits, they face a complex three-step process followed by federal court review. The named plaintiff and intervenor in this case, both of whom ultimately succeeded on their claim that their benefits had been terminated in error, brought this case to challenge the unwarranted delays they encountered in the first two steps of that process.

The Disability Insurance Benefits (DIB) program was created in 1956 under Title II of the Social Security Act, as amended, 70 Stat. 815, 42 U.S.C. §423(a), to provide monthly benefits to workers whose employment history qualifies them as "insured" and who are currently unable to engage in any substantial gainful activity because of their disability. 42 U.S.C. §423(c)(1), (d)(1)(A). The program is administered by the Secretary of the United States Department of Health and Human Services (HHS) through the Social Security Administration (SSA). In Vermont, the Social Security Administration has contracted with the Vermont Disability Determination Agency (DDA) to make determinations of disability with respect to Vermont claimants. *See* 42 U.S.C. §421.

Section 205(b) of the Social Security Act, 42 U.S.C. §405(b), requires the Secretary "to make findings of fact, and decisions as to the rights of any individual applying" for benefits. When an application is denied, or when upon subsequent review the Secretary determines that a current beneficiary has ceased to be disabled, §205(b) states that the Secretary shall provide the claimant with "reasonable notice and opportunity for a hearing." Finally, the Act provides claimants with the right to seek judicial review in federal court after a final decision of the Secretary made after hearing. 42 U.S.C. §405(g).

In implementing the Act, however, the Secretary has chosen to establish a mandatory three stage appellate

review procedure as a precondition to seeking judicial review:[1]

"Reconsideration"—a paper review by the DDA of its initial determination, 20 C.F.R. §404.904;

A hearing before an Administrative Law Judge, 20 C.F.R. §404.929; and

A paper review before the Appeals Council, 20 C.F.R. §404.967.

Significantly, no time frames are built into the regulations governing any of these three stages of review despite the fact that claimants may be without benefits during this period and are barred from seeking further review until each stage is completed. *See* Brief for the Petitioner (hereafter, Br.) at 3-6; 20 C.F.R. §404.900(a)(5).

While the Secretary's Statement provides a general overview of the SSA appeals process and evolving statistics, it makes little mention of the factual record considered by the courts below.[2] Yet in enjoining unreasonable delays at the first two phases of the administrative appeals process, the district court considered detailed data concerning the inner workings of the review process in operation in the State of Vermont. Indeed, this factual development was crucial to the outcome of the case below.

Named plaintiff Leon S. Day had been determined disabled in 1975 because of a stroke. J.A. 26. In November 1977 the Secretary determined—erroneously, as she ultimately conceded nearly three years later (J.A. 150)—that his disability had ceased. Accordingly, the benefits which had been the primary source of support for Mr. and Mrs. Day and their three children were terminated.

Mr. Day requested reconsideration of the determination that he was no longer disabled. The DDA took 167

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[1]Respondents are not suggesting any violation of §205(b) in the creation of this complex procedure.

[2]The circumstances of named plaintiffs Day and Maurais, *e.g.*, are relegated to one note. Br. at 10-11, n. 15. Even there the information supplied is not complete, for Mr. Day like Mr. Maurais ultimately prevailed on his appeal. Joint Appendix (hereafter, J.A.) 150.

days to review its determination and respond—negatively—to Mr. Day's appeal. Mr. Day then immediately requested a hearing from SSA. However, notwithstanding the passage of some five months, no hearing was ever scheduled. It was only after this action as filed in the district court that an administrative hearing was scheduled and held in December 1978, almost a year after the initial request for review of the adverse determination.

During this period, Mr. Day went deeply into debt. At the time this action was filed in November 1978, Mr. Day had $27 in cash and owed $1,181.93 for fuel and $133 for medical expenses. His only asset of any significance was a 1964 Chevrolet valued at $50. J.A. 18. The family was forced to give up its living quarters and move. J.A. 21.

Intervenor Amedie Maurais, who was also ultimately successful in his appeal, faced similar delays and hardships. From the date when he filed his request for reconsideration until a hearing was scheduled, 280 days passed. During this time he went into substantial debt to maintain his home, had difficulty affording needed prescription drugs, and was unable to repair his 10 year old pick-up truck. J.A. 34.

In the proceedings before the district court, the delays encountered in the named plaintiffs' cases, as well as those of other claimants in Vermont, were explored in considerable detail. Three conclusions emerge from an examination of this record:

1. Nothing done by the named plaintiff or intervenor, nor indeed by the claimants in almost any of the other Vermont cases reviewed, were the cause of the severe delays encountered.

2. In all of the cases reviewed which took longer periods of time to process, and in many of the others, there were, as the district court found, "lengthy unexplained delays." Petition Appendix (hereinafter, Pet. App.) E at 25a.

3. To the extent explanations for delays were provided, they frequently showed that processing "mistakes" had been made or that the program was being maladministered.

With regard to reconsideration, Mr. Day's case demonstrates two different, non-claimant caused types of delays. First, the simple act of initiating arrangements to forward relevant portions of the claims folder to the DDA, typically accomplished within a few days, took 34 days. *Compare* J.A. 55-56 with J.A. 105-149. Once the folder was received, the reconsideration determination took one day. Next, 38 more days passed before Mr. Day's case was selected for a "Quality Assurance Review" procedure that is utilized in a selected sample of cases. J.A. 56. Four months were then consumed by this process, during which Mr. Day had neither benefits nor an opportunity to appeal to a higher level.

There have never been a large number of reconsideration cases before the Vermont DDA. Between October 1, 1977 and January 31, 1980, the Vermont DDA received 421 requests for reconsideration of initial denials and 32 requests for reconsideration of terminations of benefits. J.A. 91, 93. At this time agency officials explicitly recognized the need to implement procedures to shorten processing times in "aged cases", i.e., those incomplete after 70 days. J.A. 167. The average processing time for the 421 reconsiderations of initial applications was 54.9 days, but many of the cases took well over 100 days. J.A. 91 and Att. A (in record). Of the 31 termination cases on which information was available, only nine were decided in less than 90 days. J.A. 94.

In response to respondents' discovery requests, the Secetary supplied summaries of 77 randomly selected cases (J.A. 105-149) which she said were "representative of the reconsideration process." Pet. App. E at 26a, n.6. While 12 of the summarized cases were processed in 30 days or less, more than one-third were incomplete after 90 days, and a large number took over 120 days. Pet. App. E at 25a. The district court concluded that in every reconsideration that ". . . took longer than 90 days there are periods of unexplained delay, not directly attributable to necessary steps in the reconsideration process." Pet. App. E at 28a.

While delay in sample cases, as well as in the named plaintiffs' cases, may have been "unexplained," indications of likely underlying causes are found in the record.

These sample cases clearly illustrate the possible causes of reconsideration delay and the near universal link to agency error. J.A. 105-149.

In the first place, the summaries established several reasons that are not the cause of delay. In not one case was the delay caused because a face-to-face interview was held or because a claimant requested additional medical examinations. Further, in only one of the 77 cases did a claimant or representative request a delay. J.A. 107, 125-26.

Rather, virtually every case summary with a lengthy processing time involved one or more of the following characteristics:

1. DDA failure to follow-up promptly upon its requests for medical information which were still unanswered.
2. DDA failure to act with dispatch after receipt of new medical evidence or in scheduling consultative examinations.
3. Internal DDA failure to review evidence or generate notices promptly.
4. Breakdown in communication between DDA and SSA offices.

In addition, many of the 77 sample summaries provide examples of multiple, independent causes of agency delay in single cases.[3]

Further explanation for delay is found in the testimony of agency officials. The Administrator of the Vermont DDA stated, for example, that during the applicable time period examiners had carried widely disproportionate caseloads. Administrative changes had to be made so that time could be scheduled more effectively.[4] SSA

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[3]The case summary data, J.A. 105-149, was analyzed in detail by respondents for the district court. *See* Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment (Mar. 4, 1981) at 5-11 and Appendix 2.

[4]J.A. 162. The Secretary had previously reported that the annual budget of the Vermont DDA increased from $354,024 in 1975 to $750,000 in 1980, while both the initial and the reconsideration case loads remained relatively constant. J.A. 43, 61, 155-56.

regional officials visiting the Vermont DDA observed that "the main reason for the high percentage of aged [*i.e.*., delayed] cases in Vermont is lack of timely follow-ups and basic inadherence to sound development practices." J.A. 168. On a later visit, it was observed that "the single largest contributing factor is low examiner productivity . . . [which] manifests itself in the mean processing time for both Titles II and XVI." J.A. 177.

The unreasonable delays encountered in the reconsideration process are, for all too many of those whose denials are affirmed and who seek further review, only the prelude to delay pending the scheduling of a hearing before the Administrative Law Judge. Once again Mr. Day's case is illustrative. An adverse reconsideration determination was issued by SSA on June 6, 1978 and a letter requesting a hearing was received by SSA on June 16. Under the normal procedure, such a request is *immediately* forwarded to the SSA hearing office in Manchester, New Hampshire. At that point the case is assigned to an ALJ on a rotating basis, based on the order in which it is received. The claim folder is also located and sent to the hearing office where case controls are established, additional medical development is undertaken, and a hearing scheduled. J.A. 47, 48, 50.

In Mr. Day's case, however, the Social Security District Office improperly held the file for over two months due to an employee's mistaken belief that a simple form being sought for the record was a precondition for further action when it plainly was not. J.A. 47-48, 57. As a result, there was a delay of two and a half months in assigning an ALJ to the case. This meant that the file could not be reviewed for further developments and a hearing could not be scheduled. Then, when the hearing office received the file, it took no further steps until this suit was filed on November 15, 1978. J.A. 57. On November 20, a notice was mailed to Mr. Day scheduling a hearing on December 4, some 340 days after he initiated his appeal.

Delays at the hearing level are of critical importance since the vast majority of Vermont claimants who are unsuccessful at the reconsideration level request a hearing, J.A. 61-62, at which the majority are found to be

eligible for benefits. At the time this case was heard below, more than 56 percent of them were successful at hearing level.[5] Moreover, the record shows that the Secretary had in January 1978 established 90 days as the standard for scheduling all hearings in Vermont, J.A. 50, 52, and that the Secretary had concluded that she had the full complement of ALJ's which she needed to process the Vermont caseload.[6] The only explanations in the record as to why this 90 day standard could not be met are scheduling problems when "distant travel" is required and the need to obtain medical evidence.J.A. 52. Nonetheless, a review of 194 individual Vermont case summaries submitted to the district court showed that there was an unexplained failure to meet the 90 day standard in just over half the cases. J.A. 50, 47, 63-67.

Finding that hearing delays in Vermont violated §205(b) of the Act, Pet. App. D, and some two years later finding that reconsideration delays did as well, Pet. App.

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[5]J.A. 53. While more recent figures on reversal rates in Vermont are not available, published data indicates that they are likely to have increased. For example, in Region I (the New England region which includes Vermont), the reversal rate at the hearing level for Title II disability cases was 55.1% in 1976-1978. J.A. 53. In May 1983, over 63% of those claimants who received a decision after a hearing were successful. Department of HHS, SSA, Office of Hearings and Appeals, *Key Workload Indicators*, May 1983, 3 (June 29, 1983) (the Secretary lodged a copy of this publication with the Clerk of this Court, *see* Br. at 3). Many other claimants are ultimately found eligible for benefits before the Appeals Council or federal courts. *See id.* at 9, 14.

[6]J.A. 48. The Secretary has authority to transfer ALJs into Vermont if necessary, J.A. 51, but has apparently not found it necessary to do so in order to achieve virtually total compliance with the 90 day time limit ordered in *Barnett v. Califano*, 580 F.2d 28 (2d Cir. 1978), an earlier Vermont case involving hearings before the same ALJs in SSI cases, or the 90 day order in this case. *See* Appendix to this brief, attached to show the Secretary's ability to comply with the district court's order, para. 2 (hereafter App.). Since compliance has been achieved with existing resources, resources do not appear to have been the problem.

E, the district judge enforced the claimants' statutory rights by imposing deadlines to complete reconsiderations and to schedule hearings that were well within the Secretary's capabilities. Most significantly, the court excepted from its time limitations all those cases wherein delay is "... caused at the claimant's instance or where the delay is assignable to the claimant's contention that changed circumstances mandate reconsideration of additional evidence." Pet. App. E at 30a. In addition, the court exempted from its time limitations on reconsiderations all time needed for consultative medical examinations requested by the agency. Moreover, unlimited time further was allowed for post-hearing development and preparation of the decision by the ALJ. The district court drafted these exceptions in careful detail, Pet. App. F at 33a - 34a, which convinced the court of appeals that "... the relief ordered was crafted with an eye toward the Secretary's concerns," including the need "... to assure accurate results." Pet. App. A at 8a.

Finally, to insure SSA compliance with its order (and not incidentally, to prevent irreparable injury to wronged claimants), the district court drew upon its equitable powers to provide for a recoupable, prospective interim payment device in favor of claimants who continued to suffer illegal unreasonable delay. Significantly, while this enforcement mechanism can be triggered only by future violations of the order by the Secretary, it likewise terminates when any action by the claimant serves to prolong the delay. Pet. App. F, paragraphs 6 and 7. Indeed, although the outer-bound of a routine reconsideration processing was found to be 90 days, the trial court disallowed interim relief until the passage of 180 days, being ". . . persuaded that this solution most appropriately balances the administrative difficulties in implementing this order and the financial needs of deserving claimants." Pet. App. E at 31a.

The relief granted by the district court became effective in Vermont on December 30, 1980, with respect to hearings, and on December 29, 1981, with respect to reconsiderations. Pet. App. F, paragraphs 3, 5 and 9. No stay was

sought by the Secretary pending any subsequent appellate developments. The Second Circuit affirmed the district court judgment in all respects on June 28, 1982. Pet. App. A.

SUMMARY OF ARGUMENT

I

The Secretary does not dispute that Congress, in designing a program to provide insurance benefits to disabled workers and their families, intended that aggrieved claimants have the right to have their claims heard by the agency within a reasonable time. This conclusion is supported by the language of the statute guaranteeing claimants a right to a hearing, §205(b) of the Social Security Act, 42 U.S.C. §405(b), the legislative intent of the Social Security Act, and the agency's contemporaneous construction of the Act. It also follows logically that the statutory right to prompt hearings cannot be frustrated by the Secretary's imposition of additional procedures which a claimant must exhaust before he can become entitled to a hearing.

In determining whether the delays faced by respondents were indeed unreasonable, the district court analyzed the factual record which was some three years in the making. That record showed lengthy delays which were often unexplained and were not required to ensure that each case was adequately developed and accurately considered. Based on this record, the district court concluded that the delays both at the reconsideration and hearing level were unreasonable, violating respondents' rights under the Social Security Act.

That the district court was correct in concluding the delays were unreasonable can perhaps best be seen by comparing the delays and attendant harms faced by respondents herein with the situation which this Court reviewed in *Fusari v. Steinberg*, 419 U.S. 379 (1975), concerning Title III of the Social Security Act. In that case, the Court looked at all the facts in the case to determine that the timeliness requirement in the unemployment

compensation program was violated. When the factual situation in *Fusari* is compared to the factual situation presented herein, it is evident that the district court was correct in finding the delays unreasonable. In every regard—length of delays, amount of benefits at stake, the likelihood of the claimant prevailing at the hearing, and the justification or lack thereof for the delays—the delays present in the instant case are more unreasonable than the delays found unacceptable in *Fusari*.

II

The remedy devised by the district court—imposition of objective time limits which exclude time necessry for the proper development of cases—took into account the valid needs of the Secretary and at the same time served to remedy the violation of respondent's rights. The time limits incorporated the Secretary's own standards and provided the court an objective standard to determine if respondent's rights were being violated. The use of time limits is hardly unreasonable given the Secretary's past and present statements regarding their usefulness to ensure the expeditious processing of cases and the Secretary's failure to offer the court any alternative remedy. Moreover, the use of time limits as a remedy for violation of the Social Security Act does not conflict with any provision of the Act and is consonant with the purposes of that Act. Finally, the remedy is in no way inconsistent with continuing congressional oversight activities.

III

Finally, that part of the district court's order which requires the Secretary to make interim payments when a claimant's rights to reconsideration decisions and the holding of a hearing within a reasonable time are violated is an effective and fair way to ensure that the Act and the court's order are obeyed. No payments are made if the Secretary complies with the Act and the court's order. No statute or case law bars the court from utilizing such an enforcement mechanism.

ARGUMENT

I. THE COURTS BELOW CORRECTLY DECIDED THAT, ON THE RECORD BEFORE THEM, RESPONDENTS' RIGHTS TO DECISIONS ON THEIR CLAIMS FOR SOCIAL SECURITY DISABILITY INSURANCE BENEFITS WERE VIOLATED BY UNREASONABLE DELAYS.

A. The Social Security Act Requires That All Appeals Be Decided Within A Reasonable Time.

Section 205(b) of the Social Security Act provides that the Secretary shall provide aggrieved individuals seeking benefits "reasonable notice and opportunity for a hearing." The courts below concluded that a "reasonable ... opportunity for a hearing" meant, *inter alia*, a hearing provided within a reasonable time. The Secretary does not address this reading of the statute, however, but appears to concede this point by focusing instead upon the measure of reasonableness.[7]

A review of the history of §205(b) and the federal agency's application of that provision to its administration of the program confirms the common-sense correctness of the reading of the statute by the courts. The requirement that aggrieved individuals receive "reasonable ... opportunity for a hearing" has remained intact since §205(b) was added to the Social Security Act of 1935 by the 1939 amendments. Act of August 10, 1939, ch. 666, §201, 53 Stat. 1362. Although Congress has since amended §205(b) in various respects on at least six different occasions[8] the language of the section has not been changed. Therefore, to determine the right afforded by the statute,

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[7]Nor apparently did the Secretary dispute this construction when the issue was first decided in the Second Circuit, *White v. Mathews*, 559 F.2d 852, 858 (2d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978).

[8]Act of Aug. 28, 1950, ch. 809, §108(a), 64 Stat. 518; Act of Aug. 1, 1956, ch. 836, §111(a), 70 Stat. 831; Act of July 30, 1965, Pub. L. No. 89-97, §308(d)(9), 79 Stat. 379; Act of Jan. 2, 1976, Pub. L. No. 94-202, §4, 89 Stat. 1136; Act of June 9, 1980, Pub. L. No. 96-265, §305(a), 94 Stat. 457; Act of Jan. 12, 1983, Pub. L. No. 97-455, §4, 96 Stat. 2499.

the crucial issue is the intent of the Congress that enacted it. *See New York Telephone Co. v. New York State Dept. of Labor*, 440 U.S. 519, 527 (1979) (plurality opinion).

Congress did not specifically explain its purpose in enacting §205(b); the congressional reports merely paraphrased the statutory language. *See* H. Rep. No. 728, 76th Cong., 1st Sess. 42 (1939); S. Rep. No. 734, 76th Cong., 1st Sess. 51 (1939). However, the overall purpose of the 1939 amendments was "to strengthen and extend the principles and objectives of the Social Security Act." H. Rep. No. 728, *supra* at 5. Those objectives were broadly remedial: to "relieve the existing distress and . . . to reduce destitution and dependency in the future," H. Rep. No. 615, 74th Cong., 1st Sess. 3 (1935), and to provide a "more comprehensive attack on insecurity."[9]

The early administrators recognized that the expeditious processing of claims was a necessary precondition to meeting the goals of the 1935 Act. They put into operation a system which handled numerous claims with great speed, even though they lacked the automated systems available today to handle large numbers of claims. An early appraisal of the adjudication system established by the Bureau of Old Age and Survivors Insurance of the Social Security Board for processing both initial claims and reconsiderations stated:

> A large volume of cases has been handled with efficiency and dispatch. The average time which elapses from receipt of the file by the Bureau until a letter goes out disposing of the case is now between 6 and 10 days, and it is expected that the time will soon be reduced substantially. Under the old act [*i.e.*, before the 1939 amendments] the

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[9] *Ibid; see, also*, S. Rep. No. 628, 74th Cong. 1st Sess. 2 (1935); Message of the President Recommending Legislation on Economic Security, H. Doc. No. 81, 74th Cong., 1st Sess. (1935).

Social Security Board Chairman Arthur Altmeyer reports that he urged adoption of the hearing provision in 1939 as "essential to protect the statutory right to benefits." A. Altmeyer, *The Formative Years of Social Security*, 102 (1966).

> average time was reduced to slightly less than two days.[10]

It was within this context of an agency handling cases with "efficiency and dispatch" that Congress added the right to a hearing in 1939.

As noted above, the Social Security Board clearly understood that a program designed to eliminate economic dependency required prompt hearings. In adopting provisions to establish the hearing system which the 1939 amendments required, the Board recognized the need for expedition among the "requirements . . . which must necessarily be met":

> Both from the standpoint of efficiency in handling so large a volume of cases, and by reason of human needs of the beneficiaries of the social insurance system, *expedition* in disposing of claims and of wage record cases *is of the essence of the task to be performed* . . . [I]t would often entail hardship for beneficiaries to be compelled to wait a period of months for the satisfaction of their claims . . . *Whatever hearing and review procedures adopted must be such as will not prevent*

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[10]Attorney General's Comm. on Administrative Procedure, *Administrative Procedure and Government Agencies*, S. Doc. No. 10, 97th Cong., 1st Sess. (Pt. 3) 13 (1941). The Attorney General's report included as an appendix the Social Security Board statement of policy for the implementation of the hearing requirement contained in the 1939 amendments. The statement exemplifies the high standards established by the early administrators of the Social Security Act. The need for the accurate processing of a large volume of cases was not seen as a reason to compromise the needs of claimants to receive prompt decisions on claims. Moreover, the procedures to be established were always designed to be respectful of the dignity of the claimants. *See, e.g., id.* at 36-38.

prompt action in the final disposition of claims.[11] The Board expressly stated its expectations for how promptly claims would be processed:

> The Bureau will not normally require more than 30 days in making its initial determination in relation to any claim after the claimant has assembled all essential proofs. It is expected that the Bureau's decision will be reexamined upon request within a specified time limit, say 30 days, being thoroughly reconsidered on the basis of further case development whenever there is anything to be gained by this process.

Id. at 40-41. Finally, in discussing the scheduling of hearings, the Social Security Board stated: "All hearings should be held within 30 days of the time requests are filed." *Id.* at 45.

Thus, the agency charged with implementation of the Act believed the timely provision of hearings to be "the essence of the task to be performed" under §205(b).[12] This "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery

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[11] *Id.* at 37 (emphasis added). The Secretary is correct in pointing out that the Social Security Board recognized important interests in fairness, uniformity, and accuracy of determinations. Br. at 20. But the Board did not see these interests as countervailing to the need for expeditious processing, noting, for example, that in "wage record proceedings, delay obviously would result in a well-nigh impossible accumulation of cases." *Administrative Procedure In Government Agencies, supra* at 37. In any case, in implementing the Act the Board clearly believed that expedition in the processing of claims was required.

[12] The Secretary notes that the Board did not list the timing of a hearing as a "Legal Consideration" in its statement. "Legal considerations" were seen as setting limits to the Social Security Board's freedom of choice in establishing and carrying forward its administrative methods. *Id.* at 36. Since the Board viewed expedition as one of those "requirements . . . , which necessarily must be met," *id.* at 36, it discussed it first, before its discussion of those "legal considerations" which had to be taken into account in satisfying the requirements such as expedition.

in motion, of making the parts work efficiently and smoothly while "they are yet untried and new" is entitled to "peculiar weight." *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933) (Cardozo, J.), quoted with approval in *American Paper Institute, Inc. v. American Electric Power Service Corp.*, ___ U.S. ___, 76 L. Ed. 2d 22, 51 U.S.L.W. 4547, 4552 (1983). Moreover, the Board's statement continued as the accepted policy of the agency after the disability insurance program was enacted and implemented. *See Administration of Social Security Disability Insurance Program: Hearings Before the Subcommittee on the Administration of the Social Security Laws of the Committee on Ways and Means*, 86th Cong., 1st Sess. 642 (1959).

Like the federal agency charged with administering Title II of the Social Security Act, this Court has interpreted the Social Security Act in light of Congress' remedial purpose in enacting the statute.[13] This Court has been willing to "assume a Congressional solicitude for fair procedure, absent explicit statutory language to the contrary" and has acted to ensure that the Secretary's procedures fairly implement the Act. *Califano v. Yamasaki*, 442 U.S. 682, 693 (1979); *cf. Richardson v. Perales*, 402 U.S. 389, 400-01 (1971) (procedures must be "fundamentally fair").

The cases most analagous to the instant case in the concern about timeliness of agency action are those construing the requirement in Title III of the Social Security Act that unemployment compensation benefits be paid "when due." 42 U.S.C. §503. Most notably, in *Fusari v. Steinberg*, 419 U.S.379, 384, this Court was asked to rule on the lawfulness of Connecticut's procedures under which unemployment compensation benefits, terminated after an agency employee had interviewed the

[13] *See, e.g., United States v. Silk*, 331 U.S. 704, 712 (1947). This same approach has been consistently followed by the lower courts. As one court noted, "The books are replete with cases holding that the Social Security Act is a remedial statute to be broadly construed and liberally applied." *Haberman v. Finch*, 418 F.2d 664, 667 (2d Cir. 1969). *See also, e.g., Dousewicz v. Harris*, 646 F.2d 771 (2d Cir. 1981); *Davidson v. Gardner*, 370 F.2d 803, 807-808 (6th Cir. 1966).

recipient and determined that job search efforts were insufficient, were not resumed until the claimant prevailed at a hearing which was held an average of 126 days later. The Court did not find the termination itself a violation of the "when due" requirement, since the termination procedures afforded an informal opportunity to be heard as required by *California Department of Human Resources Development v. Java*, 402 U.S. 121 (1971). Instead, the Court, having concluded that "[t]he basic thrust of the statutory 'when due' requirement is timeliness," 419 U.S. at 387-388 (footnote omitted), found that the unreasonable delay in providing a hearing under all the circumstances of the case contravened the timeliness requirement implicit in the §503 requirement that benefits be paid "when due."[14]

Similarly, in *Java*, this Court was called upon to interpret the words "when due" in connection with a California practice of stopping payment when an employer raised a claim not initially considered. This Court noted that unemployment compensation benefits were designed to replace wages lost through no fault of the employee.[15] The Court then observed that Congress wished that eligibility be determined and payments be made as speedily as possible, and that the "when due" provision had to be construed in light of that underlying purpose. In sum, payment was to be made not whenever the agency reached a determination that payment was due, but at the first occasion for the agency to reach that determination.[16]

Given the language of the statute, the framework provided by this Court in its decisions, and the approach

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[14]The Court remanded the case for further proceedings in light of major changes in the Connecticut system at issue. *Id.* at 391.

[15]Thus the benefits at issue in *Java* were, in this regard, no different from the disability insurance benefits involved here.

[16]This Court has also not hesitated to find that Congress intended agencies to conduct administrative proceedings expeditiously when it has examined other statutory schemes. *See, e.g., Atlantic Refining Co. v. Pub. Serv. Comm'n. of N.Y.*, 360 U.S. 378, 390 (1959).

taken by other federal courts in interpreting the various provisions of the Social Security Act, it is not surprising that the courts below had little difficulty in concluding that the "reasonable notice and opportunity for a hearing" language in §205(b) requires that aggrieved individuals be afforded a hearing within a reasonable time.

The lower courts were also correct in extending their analysis to the reconsideration level. If the Act requires hearings within a reasonable time, it surely does not allow processes to be interposed[17] that themselves take unduly lengthy periods of time. Indeed, this Court included reconsideration delays in analyzing the length of time former recipients might have to wait to obtain a hearing. *See Mathews v. Eldridge*, 424 U.S. 319, 342 (1976). As the Secretary admits (Br. at 45), she has plenary authority to impose time limitations on state agency reconsideration determinations and perhaps to eliminate reconsiderations altogether. *See, also,* n. 24, *infra*. Surely she should not be able to shield herself from her statutory obligations because of her failure to exercise her authority.

Rather than challenge the lower court's interpretations that the Act requires that hearings be provided within a "reasonable" time, the Secretary appears to argue that the lower courts were incorrect in finding that the delays which confronted respondents violated their statutory right to a hearing within a reasonable time. Br. at 33. We now turn to that issue.[18]

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[17]The reconsideration level is a creation of the Secretary, not required by statute. However, in 1983 Congress required that the Secretary provide claimants who have been determined to be no longer disabled with an opportunity for a hearing as part of any reconsideration of their claim. Pub. L. 97-455, §2, 96 Stat. 2499. H.R. 3755, recently reported out of the Subcomm. on Social Security of the House Comm. on Ways and Means, would eliminate the reconsideration level.

[18]Since the courts below found for respondents on the Social Security Act claim, they did not reach respondents' Administrative Procedure Act (APA) or due process claims. Pet. App. A at 9a, n. 8, App. D at 15a, and App. F at 26a. Indeed, these claims are not presently before the Court, not having been

B. The Delays Encountered by Respondents, Being Unrelated to Proper Case Development Needs, Were Unreasonable as a Matter of Law.

The factual record developed in the district court established that the lengthy delays encountered by respondents were not related to the necessities of the disability

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presented as questions for review. Supreme Court Rules 34.1(a) and 21.1(a) and (f). Therefore, if this Court disagrees with the courts below that the Secretary violated the Social Security Act, a remand to consider respondents' other claims would then be in order. *Schweiker v. Gray Panthers*, 453 U.S. 34, 50, n. 23 (1981). *See Dandridge v. Williams*, 397 U.S. 471, 475, n.6 (1970). In light of the Secretary's having addressed these issues, Br. 39-44, we wish merely to note that the law is not so simple as the Secretary suggests. As to the APA, the Secretary is required under 5 U.S.C. §555(b) and (e) to conclude administrative appeals "within a reasonable time" and to give "prompt notice" of decisions. Moreover 5 U.S.C. §706(1) authorizes a reviewing court to "compel action unlawfully withheld or unreasonably delayed." Although the Second Circuit never reached the issue, the other courts of appeals which have considered Social Security delays have found that the APA is applicable. *Caswell v. Califano*, 583 F.2d 9, 15, n. 13 (1st Cir. 1978); *Blankenship v. Secretary of HEW*, 587 F.2d 329, 333 and n.5 (6th Cir. 1978); *Wright v. Califano*, 587 F.2d 345, 351 (7th Cir. 1978).

Contrary to the Secretary's assertions, the legislative history, the U.S. Dept. of Justice Attorney General's Manual on the Administrative Procedure Act (1946), and the case law demonstrate that the APA is applicable to this case. For example, the Senate Committee on the Judiciary Report stated that 5 U.S.C. §555(e) "affords the parties in any agency proceeding, whether or not formal or upon hearing, the right to *prompt action upon their requests, immediate* notice of such action, and a state of the actual grounds thereof." S. Rep. No. 752, 79th Cong., 2d Sess. 206, n.48 (emphasis supplied). *See, also, Deering Milliken, Inc. v. Johnston*, 295 F.2d 856 (4th Cir. 1961). In discussing 5 U.S.C. §706(1), the Attorney General's Manual cites with approval *Safeway Stores, Inc. v. Brown*, 138 F.2d 278 (E.C.A. 1943), *cert. denied*, 320 U.S. 797 (1943), where the court held that a writ of mandamus could issue when an agency unreasonably delayed final action, even in the absence of an express statutory time limitation. Finally, neither this Court

evaluation process. In fact, nothing in the record justified the interminable delays and resultant hardships caused to innumerable disability claimants in Vermont. In the end, the specific facts of the case made it readily apparent that the Secretary's routine failure to satisfy the "need for expedition" in §205(b) could be eliminated in a manner that remained consistent with all statutory goals.

As this Court noted in *Fusari v. Steinberg*, 419 U.S. at 389, n.15, "'[a]ny statutory requirement that embodies notions of timeliness, accuracy, and administrative feasibility inevitably will generate fact-specific applications.'" There, statistics showing average appellate delays of 126 days and subsequent reversals in favor of 19.4% to 26.1% of the unemployment compensation claimants—reversal rates far less favorable to claimants than the 56% figures encountered in the instant case—were the key elements that led the Court to "determine on this record that Connecticut's previous system often failed to deliver benefits in a timely manner."[19]

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nor other courts have held that the APA is limited to situations where an agency refused to act or acted improvidently. *See Costle v. Pacific Legal Foundation*, 445 U.S. 198, 220 n.14 (1980); 3 K. Davis, *Administrative Law Treatise*, 5257 (2d ed. 1980).

The due process argument here is altogether different than the claim advanced in *Mathews v. Eldridge, supra*, and relied upon by the Secretary. Br. at 39. Respondents do not seek a pre-termination hearing. Rather, they contend that they are not being afforded an opportunity to be heard "at a meaningful time." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Therefore, the balance of interests is different than that performed by the Court in *Eldridge*, and depends upon how the facts in this case affect the balance of interests at stake. *See White v. Mathews*, 434 F. Supp. 1252, 1260-61 (D. Conn. 1976), *aff'd on statutory grounds* 559 F.2d 852 (1977).

[19] *Id.* at 383-84, 388. In its past term, the Court utilized a similar analytical framework in weighing the length of, the reasons for, and the injury engendered by delay in customs currency forfeiture proceedings to conclude that there was no violation of the due process clause. *United States v. Eight Thousand Eight Hundred and Fifty Dollars*, U.S. , 76 L. Ed. 2d 143, 152, 51 U.S.L.W. 4587, 4589 (1983); *see also Barker v.*

Moreover, the results largely favorable to plaintiffs in Social Security delay cases from other jurisdictions have been grounded in similar factual development analyzing the nature of the steps in the administrative process, the length of delays, reversal rates, and the nature of injury to generally faultless claimants.[20] In short, the courts have uniformly rejected the notion that interpretation of §205(b) is exclusively left to Congress and the Secretary. (Br. at 36). *Cf. INS v. Chadha*, __ U.S. ___, 77 L. Ed. 2d 317, 346, 51 U.S.L.W. 4907, 4917, n.16 (1983) (agency action "is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded, it is open to judicial review as well as the power of Congress to modify or revoke the power entirely.")

Wingo, 407 U.S. 514, 530-31 (1972) (6th Amendment speedy trial analysis necessarily dependent on peculiar circumstances of case); *Deering Milliken, Inc. v. Johnston, supra*, 295 F.2d at 867-868 (whether delay violates APA reasonable dispatch requirement dependent on nature of proceedings, problems of agency, and interests of parties.)

[20]*See, e.g., White v. Mathews, supra*, 559 F. 2d at 858-59; *Caswell v. Califano, supra*, 583 F.2d at 12-13, 15; *Blankenship v. Sec'y of HEW, supra*, 587 F.2d at 334; *Barnett v. Califano, supra*, 580 F.2d at 30, 32; *Wright v. Califano, supra*, 587 F.2d at 353-54; *Crosby v. SSA*, 550 F. Supp. 1278, 1280-82 (D. Mass. 1982), *appeal pending*; *Williams v. Schweiker*, 541 F. Supp. 1360, 1363 (E.D. Mo. 1982), *appeal pending*. Even in *Wright*—where no violation of §205(b) was found—the Seventh Circuit applied a fact-specific analysis. However, the plaintiffs there failed to prove or even allege that "inexcusable circumstance" was a primary cause of delay. 587 F. 2d at 353, 354. Moreover *Wright* alone was a nondisability case and the named plaintiff sought only an increase in the retirement and survivors benefits exclusively at issue. *Id.* at 350, n.5, 355. In light of the "prospect for future progress in the reduction of processing times," and while leaving open the possibility of future intervention, the court declined to act. *Id.* at 354 and n.15, 356. Indeed, faced with a factual record containing a different equitable balance in *Smith v. Miller*, 665 F.2d 172, 176, 177 and n.5 (1981), the Seventh Circuit found no conceptual difficulty with the imposition of an "automatic approval" remedy to eliminate "unwarranted agency delay" encountered by Illinois Medicaid applicants.

In examining the claims of unreasonable delay in the instant case, the district court engaged in precisely the type of "fact-specific" analysis that Justice Powell articulated in *Fusari*. Indeed, the record developed below contains more comprehensive data than the reversal percentages and length of delay statistics that were enough to enable this Court to conclude that the requirement of expedition in Title III of the Social Security Act had been violated in *Fusari* and *Java*. Here, for example, the facts showed, *inter alia*, that:

- the Secretary had a regional hearing scheduling goal of 90 days with which she failed to comply in at least 43% of the Vermont cases. J.A. 50; Pet. App. D at 15a.

- while nothing in the prehearing case development process is inherently time consuming, plaintiff Day's experience showed delay to be caused by agency employee failure to adhere to the Secretary's own docketing procedures. J.A. 47-48, 57.

- the three ALJs hearing Vermont disability appeals equalled the Secretary's needs. J.A. 49.

- the ALJ reversal rate in favor of claimants exceeded 56%. J.A. 53.

- while both named plaintiffs ultimately prevailed in their appeals, each suffered substantial hardships through wrongful deprivation of benefits in the interim. J.A. 18, 21, 34, 150; Pet. App. D at 14a.

- while about 35% of the cases took well over 90 days to be "reconsidered" (and some exceeded one year), the agency explicitly recognized the need to shorten processing times in cases incomplete after 70 days. J.A. 91 (and Attachment A thereto contained in the record), 105-149, 167.

- the cause of delay in these cases was nearly universally linked to agency error as opposed to any necessary steps in the case development process, including lack of timely follow-ups and basic

inadherence to sound development practices. J.A. 105-149, 162, 168, 177.

- those few cases legitimately requiring relatively lengthy processing times (i.e., cases requiring additional medical development or those delayed by claimant causes) could be identified and distinguished from the majority of the cases. J.A. 52, 105-149.

In applying such facts to respondents' claims under §205(b), it is not surprising that the courts below found the primary remedial legislative goals to be severely compromised without countervailing benefit or justification. Contrary to the Secretary's assertions, the lower courts did not act "solely" based upon length of delay statistics (Br. at 11, 32), nor did they impose their "own notion" of proper processing upon the agency (Br. at 20), nor did they ignore statutory goals and "second-guess" Congress and the Secretary. (Br. at 36.) To use the Secretary's own words, the "element of timing implicit" in §205(b), *was* given content through fact-specific "reference to the overall statutory scheme and the benefits program established under that scheme." (Br. at 32.) In fact it is the agency's overemphasis upon administrative convenience that too "narrowly" and "somewhat myopically" (Br. at 34) repudiates the statutory requirement of expedition.

The logical extension of the Secretary's argument that review of her disability procedures is solely "a matter for Congress and the Secretary to resolve" (Br. at 36), would be to foreclose judicial review and relegate the district court's arduous fact-finding to an irrelevancy. The Secretary's primary argument in support of this radical position seems to be her perception that lengthy processing times are inevitably "an entrenched feature" despite

conscientious implementation of the Act.[21] The record severely undermines this position, however, for nothing inherent in the hearing development processes justifies the delays encountered by the Vermont disability claimants.

The complete absence of support in the record for the Secretary's position is most sharply focused by those few instances when she actually refers to the facts of the case.[22] For example, the Secretary attempts to undermine the significance of the 77 reconsideration case summaries that she herself supplied to inform the district court about the factual variations that may occur in the reconsideration process.[23] Yet to justify admittedly frequent delay, the Secretary can do nothing more than speculate

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[21] Br. at 33. There is no small irony in the Secretary's argument in this regard, for in *Mathews v. Eldridge*, 424 U.S. at 325, she distinguished disability determinations from those more complex factual "issues of credibility and veracity" involved in *Goldberg v. Kelly*, 397 U.S. 254 (1970). Indeed, this Court agreed, finding disability determinations to be relatively "sharply focused and easily documented decisions[s] . . . [that] will turn, in most cases, upon 'routine, standard, and unbiased medical reports by physician specialists,' *Richardson v. Perales*, 402 U.S. at 404." *Eldridge*, 424 U.S. at 343-44.

[22] The Secretary alludes to the Vermont record on which the lower court decisions largely turned at but two secondary portions of her argument. *See* Br. at 10-12 and 45, n.45. Furthermore, she entirely ignores the balanced accomodations made in response to her concerns in the district court's remedial order, which respondents discuss in depth at Parts IIA and III, *infra*.

[23] *See*, J.A. 105-49, 192-95; Pet. App. E at 26a and n.6, 28a. The Secretary filed the "77 individual randomly selected case summaries . . . in lieu of individual responses to plaintiffs' enumerated interrogatories." J.A. 105. The "enumerated interrogatories" are numbered 1-8 and 12-14 and appear between J.A. 151-57. As respondents show in their Statement of the Case, *supra* at 5, the summaries show that *every* case with a processing time exceeding 90 days contains examples of correctable agency error unrelated to claimant cause or resource problems.

that something significant and necessary to case processing must have "transpired *between* the particular milestones listed." Br. at 45, n.45 (emphasis in original). Unfortunately she failed to offer any enlightening information below to accompany her present speculation, or to refute the "sufficient factual insight" that the district court found in ruling the "unexplained" delays unreasonable. Pet. App. E at 26a.

The Secretary also ignores the reports of the Vermont DDA Administrator and her own program operations inspectors which found the primary causes of reconsideration delay to be grounded in "lack of timely follow-ups and basic inadherence to sound development practices."[24] Most significantly, the Secretary utterly fails to note that those nonroutine cases legitimately requiring more time to process are entirely excepted from the district court's order. Pet. App. E at 30a, App. F at 33a. Thus, for example, the order leaves the Secretary the time that is necessary to thoroughly and accurately develop and evaluate the medical data in individual cases.

Likewise, nothing in the record supports the Secretary's apparent concern that expedition is inconsistent with proper case development at the ALJ level of the hearing process. (Br. at 9, 37.) Indeed, her description of the hearing process, Br. at 6-10, is entirely devoid of any mention of the Vermont factual record that was determinative of the outcome of this case. Even in what she does say, the Secretary's emphasis is misplaced. In seeking to justify delay by stressing her compliance with the prehearing workup procedures in the *Office of Hearings*

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[24] J.A. 168, *see, also,* J.A. 162 and generally 161-91. The reports are discussed, *supra,* at 6. The conclusions of these persons are of particular importance since they are intimately familiar with day-to-day reconsideration activities. While the Secretary emphasizes that she does not directly control DDA activities, she concedes (as she must) that Congress has made her ultimately responsible for DDA "performance standards and procedures." Br. at 44; 42 U.S.C. 421. Indeed, she grades the state agencies based upon their ability to perform *initial* disability evalutions within a "minimum acceptable level of performance" of 49.5 days. 20 C.F.R. §404.1640 - 404.1642.

and Apeals Handbook, for example, she relegates the requirement of expedition in §205(b) of the Act to a secondary status. Br. at 8-10, 37. Yet no statute or regulation prohibits the scheduling of cases until "after the prehearing workup is completed."[25] Moreover, nothing in the record suggests that such workups cause undue delay. In fact, the first two months of ALJ-level delay in Leon Day's case resulted from the error of an SSA employee that entirely prevented the commencement of prehearing workup. J.A. 47-48, 57.

The facts in this case showed the Vermont caseload to be relatively small, while the three ALJ's there equalled the Secretary's needs. J.A. 46-7, 49. Certainly nothing in the record supports the Secretary's general concern that she might "be required to meet the applicable deadlines by reallocating resources from SSA regions that were not yet under a judicial decree."[26] Indeed, in January, 1979 the Secretary herself informed the district court of the 90 day hearing scheduling goal in effect for her operations in Vermont since January, 1978. J.A. 50. Significantly, however, this highly realistic goal was unmet in approximately 43% of the cases prior to the district court's

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[25] Br. at 37. To the extent the non-regulation *OHA Handbook* so limits scheduling, Br. at 8-10, it has no legal force and does not bind the agency. *Schweiker v. Hansen*, 450 U.S. 785 (1981). To the extent the *Handbook* prevents fulfillment of the need for expedition, it violates 42 U.S.C. §405(b). *See, also,* 20 C.F.R. §§404.941 ("a prehearing case review will not delay the scheduling of a hearing"), 404.944.

[26] Br. at 39, n.38. The absence of factual underpinnings to legitimize this as a concern material to the outcome of this case is emphasized by the fact that the Secretary can cite only alleged problems encountered in Massachusetts and New York to illustrate her point. *Id.*; Pet. at 16, n.17 and 17, n.21. The causes of such problems or even their existence were not part of the record developed below; speculation about such matters should not deflect this Court from proper review of the record of the instant case. *White v. Mass. Council of Constr. Employers*, U.S. , 75 L. Ed. 2d 1, 6-7, 51 U.S.L.W. 4211 (1983).

December, 1979 order—an order that led to near universal compliance with minimal administrative adjustment.[27]

Another key aspect of the factual analysis below was the Secretary's inability to refute the evidence concerning the hardship that almost inevitably falls upon disability claimants waiting for interminably delayed administrative action. Yet this consequence was a crucial element in the fact-specific balancing that led to the conclusion that the statute had been violated. Pet. App. A at 6a, App. D at 18a. The Secretary has it backwards when she accuses the lower courts of failing to explore all the legislative concerns within §205(b), for it is she herself who inappropriately minimizes the beneficent purposes of the statutory scheme and the requirement of expedition that helps achieve them.

In the *Java* and *Fusari* unemployment compensation cases, *supra*, an integral part of the analyses of this Court was the remedial purpose of the statute "to maintain the recipient at subsistence levels without the necessity of his turning to welfare or private charity." *Java*, 402 U.S. 131-32; *see, also, Fusari*, 419 U.S. 387-88. As we have already demonstrated, the Title II disability benefits that by definition are paid only to those unable to engage in any substantial gainful activity," 42 U.S.C. §§416(i) and 423(d), are as designed to reduce claimant hardship as the unemployment compensation due under Title III. Moreover, this Court has specifically recognized the hardships endured by physically disabled workers who have fewer options than the average unemployed person.

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[27] Pet. App. D at 15a; App. at paras.1 and 2. Moreover, as we have shown and as will become further apparent in our discussion of the careful balances that the district court struck in fashioning its remedy, the 43% statistic was hardly the sole evidence considered by the district court as the Secretary claims. (Br. at 11.)

Mathews v. Eldridge, 424 U.S. at 341.[28] There, after drawing an analogy to the lengthy delays experienced by the unemployed workers denied but two weeks of benefits in *Fusari*, the Court acknowledged that the hardships resulting from delay "may be significant" notwithstanding "potential sources of temporary income" sometimes available to the families of disabled workers with income below the subsistence level. *Id.* at 341-43.

Certainly the potential availability of food stamps and Vermont welfare benefits did little to forestall the hardships encountered by plaintiffs Day and Maurais, J.A. 18, 21, 34, or other members of their class, J.A. 103.[29] As has already been noted in their Statement of the Case, *supra*, lengthy delay led to extreme difficulties for both Mr. Day and Mr. Maurais, including accumulation of large debts, forced moves, and inability to pay for basic

[28] Of course the *Eldridge* Court went on to reject the non-statutory due process challenge to the absence of pretermination hearings in Title II disability cases, a result that, if anything, increases the need for the expeditious adjudication of appeals. Although *Eldridge* found less potential deprivation for disabled workers than for the welfare recipients in *Goldberg v. Kelly, supra*, the Court also conceded that "the degree of difference can be overstated." 424 U.S. at 341.

[29] *See, also,* Judge Holden's opinion in *Chagnon v. Schweiker*, 560 F. Supp. 71, 74 (D. Vt. 1982), a case challenging the Secretary's failure to expeditiously implement favorable decisions in Title II and XVI disability cases over roughly the same time span covered in the instant case. There, eleven affidavits documented "the obvious fact that claimants forced to undergo lengthy delays before receiving payment often suffer severe hardships . . . [notwithstanding the availability of] relatively meager Vermont General Assistance payments, food stamps, and the generosity of friends and neighbors."

Furthermore, eligibility for both food stamps and Vermont welfare benefits is premised upon complex categorical and financial eligibility rules that would hardly provide coverage for all class members. Indeed, Vermont General Assistance is limited primarily to a biweekly cash payment of $21.00 coupled with a maximum housing payment to the landlord of $124.00 per month when the rent is 30 days overdue. Vt. Dept. of Social Welfare, WELFARE ASSISTANCE MANUAL §§2611, 2613.1 (1983).

fuel, medical, automotive, or shelter expenses. The court of appeals noted that such circumstances constituted "irreparable harm", especially when considered in the context of the large escalating reversal rate in appealed disability cases. Pet. App. A at 6a - 7a.[30]

As if recognizing the absence in the record of any justification for the delays and hardships respondents endured, the Secretary relies to a considerable degree upon the allegation that new developments justify the delays that were encountered in Vermont. Thus, she complains of escalating appellate requests and speculates that the disability amendments of 1980 and 1982 (*sic*) "may have the effect of increasing processing times."[31] But even were there any merit to these conjectures, the Secretary raises them in the wrong forum. The district court acted based upon the factual record and the law before it. The

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[30] Interminable administrative agency appellate delays inherently raise the danger of "accompanying irreparable injury to the parties." *FPC v. Hunt*, 376 U.S. 515, 527 (1964); *see, also, NLRB v. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 264 (1969). In the disability cases, the harm caused by delay borders on the intolerable. *Blankenship*, 587 F.2d at 334; *Caswell*, 583 F.2d at 18 and n.15. As early as 1977 the Second Circuit observed that by definition "[t]he disability insurance program is designed to alleviate the immediate and often severe hardships that result from a wage-earner's disability." *White*, 559 F.2d at 858. In *Barnett v. Califano*, 580 F.2d at 32, the agency itself drew the Court's attention to a report citing the "great damage" and "high psychic costs" resulting from disability delays.

[31] Br. at 35. However, the Secretary's concern that the requirement of periodic review of continuing disability investigation (CDI) cases might increase delays is repudiated in large part by her own acknowledgement of the 1982 congressional relaxation of this requirement to afford her maximum flexibility, Br. at 6, n.7, discussing the effect of Pub. L. No. 97-455, §3, 96 Stat. 2499 (1983). This is a primary illustration of the fact that Congress has not hesitated to amend the Act to help alleviate the hearing backlog problem or even to retreat on earlier initiatives that have had a contrary unintended effect. Indeed, the Secretary states that one result of the amendments enacted in 1980 and 1983 will be to "actually expedite completion of the *overall* process." Br. at 35 (emphasis in original).

law remains unchanged. If new factual developments have truly altered the equitable balance upon which the order below was based, the Secretary's proper response would be a motion in the district court to modify the relief earlier granted. *See* Fed. R. Civ. P. 60(b); *New York State Association for Retarded Children v. Carey*, 706 F.2d 956,967 (2d Cir. 1983) (Friendly, J.). Thus far the Secretary has chosen not so to move, and neither has she shown that continuation of the district court's remedy would be inequitable.[32]

In the end, the facts proved that lengthy processing times were not as "entrenched" as the Secretary represents. (Br. at 33). As the courts below discovered, delay beyond 90 days was unwarranted in Vermont where the record documented the failure of the agency to follow its own procedures, to properly review or obtain necessary evidence, to mitigate internal systems breakdowns, or to comply with a professed 90 day goal that was easily achievable. Yet the district court remained fully sensitive to the agency's occasional need for unusually lengthy processing times. As we next discuss, *infra*, the remedial order imposed was entirely responsive to the Secretary's concerns.

II. THE TIME LIMITS ORDERED BY THE DISTRICT COURT ARE A BALANCED AND APPROPRIATE REMEDY THAT CURES THE VIOLATIONS OF RESPONDENTS' RIGHTS WITHOUT OVERBURDENING THE PROCESSES OF THE SECRETARY.

A. The Time Limits Allow for the Timely and Accurate Processing of Disability Cases.

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[32] The district court specifically crafted its remedy to enable SSA to "retain some flexibility to implement additional statutory review and notice requirements in the future." Pet. App. E at 29a. Note also that while the court issued its preliminary injunction enjoining unreasonable hearing delays in excess of 90 days in 1980, the Secretary was able to comply, apparently without adverse impact elsewhere, in every case but one through the first quarter of 1983. *See*, J.A. 101-04; App. at paras. 1 and 2.

After concluding that §205(b) provides disability claimants with the right to administrative appellate action within a reasonable time and after finding in the Vermont record no justification for delays exceeding 90 days, the district court held the Secretary to be in violation of the statute and turned to the task of devising a meaningful remedy. In choosing an objective standard by which to measure the reasonableness of delays faced by respondents, the court utilized the Secretary's own 90 day benchmark.[33] However, Judge Holden was unwilling, wisely as it turned out, to await implementation by the Secretary of a 90 day limit via a proposed rule.[34] Instead the court implemented a time limitation remedy in Vermont that was grounded in the Secretary's own attainable objectives.

In requiring reconsiderations to be processed within 90 days and hearings to be scheduled within a like time frame, Pet. App. F at paragraphs 2 and 4, the court never lost sight of the Secretary's needs. As the Second Circuit noted in its review of Judge Holden's order, "... the relief ordered was crafted with an eye towards the Secretary's concerns." Pet. App. A at 8a. That the district court took these concerns into account becomes obvious upon considering the following limits to the scope of the time limitation relief:

> - for reconsiderations, all cases are excluded in which new medical developments have occurred subsequent to the initial determination or the

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[33] As we have noted, the Secretary has had a 90 day hearing scheduling goal in effect in Vermont since January, 1978. J.A. 50. Moreover, as is discussed in more detail *infra* at 37-38, the district court was well aware of SSA's 1975 representation to Congress that a 90 day deadline would be in effect nationwide by 1977. Pet. App. D at 18a. Indeed, at a relatively early stage of this litigation the Secretary proposed a 90 day hearing time limit in published regulatory form. 45 Fed. Reg. 12837 *et seq.* (Feb. 20, 1980).

[34] Pet. App. D at 18a - 19a; *see, also,* n.38 and accompanying text, n.43, *infra.*

claimant undergoes a consultative medical examination suggested by the Secretary. Pet. App. E at 30a, App. F. at paragraph 2.

- for hearings, the order requires only *scheduling* within 90 days, allowing ALJs sufficient post-hearing time to arrange for additional evidentiary reports, if necessary, and to prepare an accurate decision. Pet. App. D at 19a, App. F at paragraph 4.

- for both stages of the process, all cases are excluded where claimant initiated delay is involved in any way, Pet. App. F, paragraphs 2, 4, 7.[35]

As the Second Circuit observed, these aspects of the district court's remedy insure "the only meaningful way to encourage prompt adjudication," while still leaving the agency al. the time necessary "to garner the fresh information required to assure accurate results." Pet. App. at 8a. Thus the order is entirely consistent with the recent observation of the House Ways and Means Committee that "the time needed before a well-reasoned and sound disability hearing decision can be made may vary widely on a case-by-case basis." H.R. Rep. No. 97-588, 97th Cong., 2d Sess. 19 (1982). The balance and flexibility in the time limit remedy enables the agency to "give 'adequate consideration to both speed and quality of adjudication.' "[36]

The Secretary was able to comply with the district court order by making but a few minor procedural adjustments. Thus, local staff may now have to flag

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[35] To assure compliance with the time limits, the district court also included an interim payment device in favor of wronged claimants. This aspect of the order, as well, was balanced in response to each of the Secretary's concerns. *See* Part III, *infra*.

[36] Br. at 30, n.36, quoting Staff Report of the Subcomm. on Social Security of the House Comm. on Ways and Means, 97th Cong., 1st Sess., *Status of the Disability Insurance Program* (Comm. Print 1981).

folders, fill out "Day Court Order Control Sheets," or communicate lists of cases violating the order (if any) to other components of the agency, J.A. 196-201. These tasks do not represent onerous administrative burdens. Since the district court left the Secretary free to devise procedures consistent with its order, the courts below can hardly be accused of engrafting their own notion of proper procedures upon the Secretary.[37]

Unfortunately, the Secretary repeatedly overstates the extent of the relief imposed below. Certainly no aspect of the district court's remedy requires that an opportunity for a hearing is automatically unreasonable if delayed beyond 90 days (Br. at 32), nor that a 90 day time frame must be attained on a nationwide basis (Br. at 38). The district court merely engaged in a basic judicial function of weighing the facts presented in interpreting a federal statute and ordering relief in favor of the wronged party.

In fact, respondents fully agree with the Secretary that §205(b) does not contain "fixed deadlines for holding hearings for benefits under Title II" (Br. at 19). However, neither has Congress ever intended that its primary legislative goal of expedition should be rendered nugatory by unnecessarily lengthy delays or that courts be barred from achieving that goal by utilizing an objective standard developed in light of the facts of a particular case. Indeed, the Secretary herself has repeatedly recognized that time limits represent an appropriate solution to the problem of unreasonable delay.

For example, within two months of the district court's initial decision finding unreasonable hearing delays in Vermont, Pet. App. D, the Secretary published proposed regulations requiring hearings to be scheduled within 90

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[37] Thus, the Secretary's reliance on *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978) (Br. at 31) is misplaced. Nothing in the district court's remedy can be construed to impose significant additional procedural requirements upon her agency. The order induces compliance with "statutory minima" by insuring that the Secretary fulfills the need for expedition that is "mandated by statute." *Id.* at 548, 558; *see, also, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, U.S. ,77 L. Ed. 2d 443, 462, 51 U.S.L.W. 4953, 4958 (1983).

days. 45 Fed. Reg. 12837 *et seq.* (Feb. 20, 1980). After public comment, final regulations were drafted substituting decisional time limits of 165 days. In the preamble to the final regulations at 5, SSA states its belief "that *uniform time periods* for issuing hearing decisions, and reviewing decisions *will increase the efficiency of the administrative appeals process.*" (emphasis added).[38] The agency also expressed its approval of the recommendation of the Administrative Conference of the United States that each agency adopt time limits to insure prompt disposition of adjudicatory actions. Thus, the Secretary has espoused the belief of the Administrative Conference that timetables or deadlines are "useful tools for reducing delays and are preferable to more rigid statutory time limits." *Id.* at 4.

Indeed, on August 15, 1983, the Secretary again affirmed the propriety of time limits in proposing regulations to implement the new statutory requirement (Pub. L. No. 97-455, §4, 96 Stat. 2499-50 (Jan. 12, 1983)) that evidentiary hearings be provided to claimants who request reconsideration of disability cessation determinations. The statute, like §205(b), does not contain express time limits. Nonetheless, the proposed regulations include a 60 day decisional "time limitation as an assurance to beneficiaries that this stage of the appeals process will be

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[38] Copies of the preamble and the final rule were attached as Exh. A to Def't's Opposition to Pltfs' Motion for Order Compelling Discovery and Motion to Direct Entry of Final Judgment, filed with the district court on October 22, 1980. Another copy has been lodged with the Clerk of the Court. The Secretary's rule-making effort was based in part, at least, on the 1978 remand order in *Blankenship v. Sec'y. of HEW*, 587 F.2d 329, 336, where the Sixth Circuit provided the Secretary "an opportunity to develop a nationwide rule." The Secretary opted for rule-making after declining to petition this Court for a writ of certiorari (though she had obtained two extensions of time in which to do so). After the time limit rules were modified and finalized by the Secretary, she obtained approval from the district court for promulgation via publication in the Federal Register. *See, Blankenship v. Sec'y. of HHS*, 517 F. Supp. 77, 81 and 532 F. Supp. 618, 620-21 (W.D. Ky. 1981 and 1982) *appeal pending; see also*, n. 43 *infra*.

completed promptly, *as we believe Congress intended*." 48 Fed. Reg. 36836 (1983) (emphasis added); *see, also,* n. 24, *supra*, and the regulations referred to there.

Despite her frequent recognition that time limits represent an appropriate mechanism to expedite unnecessarily delayed agency action, the Secretary has failed to exercise her authority to promulgate time limit regulations as part of an administrative solution that would alleviate the unreasonable delays the district court found in Vermont. This failure seems to be rooted in her erroneous underlying assumption that timely administrative appeals are inconsistent with "accurate, uniform, and just determinations." (Br. at 34.) In fact, reasonably expeditious appellate action is not a "countervailing interest" that will shift emphasis away from other equally important statutory goals. (*Id.* at 34, 36.) Rather all the goals within §205(b)—especially accuracy and timeliness—are integrally related, and the district court's balanced remedy shows that it treated them as such.[39]

B. The Time Limits are Entirely Consistent with the Social Security Act.

Perhaps the major conceptual error in the Secretary's argument is her apparent inability to distinguish fixed nationwide time limits that Congress does not include in §205(b) from the balanced and limited district court remedy. Thus she never addresses the central issue of the case—whether the district court abused its discretion in utilizing objective standards to determine whether the Social Security Act was violated via unreasonable delay.

The proper standard for appellate review of a federal district court's exercise of its equitable discretion, unless Congress has foreclosed such exercise entirely, is whether

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[39] Thus, *e.g.*, the flexibility given the Secretary to take all the time required to complete posthearing case development dispels her concern that the order will induce ALJs "to deny benefit claims because insufficient evidence had been obtained within the time allowed to support a finding of disability." (Br. at 38.) Moreover, the reversal rates exceeding 56% that confronted the district court were hardly an indication of either accurate, uniform, or just determinations.

the district court abused its discretion. *Weinberger v. Romero-Barcello*, 456 U.S. 305, 320 (1982). As Justice White made clear in that case, in the absence of a statutory bar district courts retain complete equitable discretion "to order relief that will achieve *compliance* with the [relevant] Act."[40] Moreover,

> [t]he essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.
> *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944)

Yet while Congress may surely intervene to guide or control equitable discretion, this Court will "not lightly assume that Congress has intended to depart from established principles" that leave courts in equity to the exercise of their sound discretion. *Weinberger v. Romero-Barcelo* at 313; *see, also, Mitchell v. DeMario Jewelry, Inc.*, 361 U.S. 288, 290-92 (1960); *Hutto v. Finney*, 437 U.S. 678, 687-88 (1978); *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) (equitable jurisdiction is comprehensive in scope and "not to be denied or limited in the absence of a clear and valid legislative command . . . in so many words or by a necessary and inescapable inference.")

In the absence of a clear statutory command barring equitable jurisdiction to remedy violations of §205(b), the Secretary points to several irrelevant sections of the

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[40] *Id.* at 318 (emphasis in original). *Cf. Bush v. Lucas*, ___U.S.___, 76 L. Ed. 2d 648, 654, 51 U.S.L.W. 4752 (1983) (federal courts have power to grant relief not expressly authorized by statute, which is to be exercised in light of relevant congressional policy determinations); *Califano v. Yamasaki, supra*, 442 U.S. at 705 (1979) (absent the clearest command to the contrary from Congress, federal courts have equitable power to issue injunctions requiring the Secretary to comply with Title II of the Social Security Act.)

Social Security Act, apparently seeking by "necessary and inescapable inference" to find congressional disapproval of the district court's approach. But it is difficult to see how legislation passed by Congress well over a generation after the enactment of an unchanged §205(b) and not referring in any way to the question of judicial relief discloses anything about the intent of the earlier Congress. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 354 n.30 (1977). Indeed, an examination of the statutes mentioned by the Secretary reveals no limitation upon the power of a United States district court to require the timely hearings mandated by §205(b).

The Secretary first refers to 42 U.S.C. §1383(c)(2), which requires hearing decisions within 90 days of hearing requests made by nondisability claimants seeking Supplemental Security Income (SSI) benefits under Title XVI of the Act. But even assuming this section has any relevance for respondents, all of whom are claimants for disability insurance benefits under the Title II program, it does not alter the propriety of the lower court actions herein.[41] In the absence of a specified limit within §205(b), the lower courts properly looked at all aspects of the situation in Vermont to determine whether or not the delays encountered there were unreasonable under that statute. Indeed, the existence of a 90 day deadline in the SSI program for nondisability cases is some indication of

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[41] Nor is the Secretary aided by her citations to *United States v. Erika, Inc.* 456 U.S. 201 (1982) and *Lehman v. Nakshian*, 453 U.S. 156 (1981). In both cases the precisely drawn statutes and unambiguous legislative histories contrast sharply with the inconclusive language of §205(b) and the consistent legislative history favoring expeditious hearings from 1939 to the present. Moreover, SSI statutory distinctions hardly represent clear legislative commands from which inescapable inferences about the Title II program can be drawn.

the time frame within which Congress expected the processing of disability appeals.[42]

The Secretary also points to the Title II expedited payment provision, 42, U.S.C. §405(q), apparently attempting to show that a disability claimant's "countervailing interest in a speedy disposition weighs less heavily" than those of nondisability claimants. (Br. at 22.) Yet four years after the enactment of §405(q), Congress authorized expedited payments to disability claimants in the SSI program. 42 U.S.C. §1383(a)(4)(B). The legislative history of §1383(a)(4)(B), which allows for the payment of up to three months of SSI benefits, indicates that Congress fully expects the Secretary to process disability claims expeditiously. The Senate Report stated:

> In order to avoid any interruption in benefits to an eligible disabled person, the committee expects that the Secretary will make the initial determination of disability before the end of the three month

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[42] *See, e.g., Barnett v. Califano*, 580 F. 2d at 31. Contrary to the Secretary's presumption, there is no indication in the legislative history as to why the 90 day time limit applied only to nondisability cases. What the legislative history does show is that one of the "main elements of the legislation creating the SSI program, was to provide an efficient, modern, national administrative mechanism . . . avoiding the unproductive red tape and delay that so many of our most needy citizens have encountered in the past to obtain help." 117 Cong. Rec. 21090 (1971) (remarks of Chairman Mills).

At the time Congress enacted Title XVI, the Secretary's regulations applicable to the predecessor Aid to Aged, Blind or Disabled program required administering state agencies to take "final administrative action" with respect to hearing requests within *60* days from the date of the request. 45 C.F.R. §205.10(a)(11) (1972). Surely Congress did not substitute federal administration to lengthen the delays faced by disabled persons awaiting a hearing decision. Indeed, it is ironic that while the Secretary complains to this Court about the undesirability of time limits, she continues to require Puerto Rico, Guam and the Virgin Islands—all of which still have Aid to the Aged, Blind and Disabled programs—to render hearing *decisions* within *90* days of request. 45 C.F.R. §205.10(a)(16) (1982).

period. S. Rep. No. 92-1230, 92nd Cong., 2d Sess. 391 (1972).

Furthermore, Congress has been aware that the courts have uniformly interpreted §205(b) to require hearings within a reasonable time and have most frequently ordered time limit remedies. *See* Staff of Senate Comm. on Finance, 96th Cong., 1st Sess., Issues related to the Social Security Disability Program 51 (Comm. Print 1979); *Social Security Appeals and Case Review Process: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 97th Cong., 1st Sess. 14, 23 (1981). Yet Congress has never legislated a change in any pertinent part of the statute. Congressional inaction as easily represents approval of the approach below as the converse. *Girouard v. United States*, 328 U.S. 61, 68 (1946). Indeed, the operative language that is the source of the entire remedy imposed below was re-enacted without change with the amendment of §205(b) that occurred on January 12, 1983. P.L. No. 97-455, §4, 96 Stat. 2499. This creates a strong presumption of an implicit adoption of that remedy with the passage of the Disability Amendments of 1983. *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978); *Merrill Lynch, Pierce, Fenner and Smith v. Curran*, 456 U.S. 353, 381-82, and at 403 n.11 (Powell, J., dissenting) (1982).

The legislative history of the Disability Amendments of 1983 reveals a continuing belief that each "disability claimant is entitled to a timely hearing." Br. at 29 quoting H.R. Rep. No. 97-588 at 19. However, contrary to the Secretary's assertions, no legislation passed by Congress regarding the payment and processing of benefits under the Social Security Act does anything to prohibit the remedial relief afforded the Vermont claimants below.

C. The Time Limits are Appropriate in Light of Congressional Oversight Activity.

The Secretary also argues that ongoing congressional oversight of Social Security Administration problems bars judicial remedial approaches. But the extensive concern of Congress with the broad problem of hearing

delays hardly precludes judicial involvement that eliminates at least a limited aspect of that problem. Most fundamentally, the Secretary never explains how the oversight functions of Congress in any way negate a duly enacted statute. *Cf. INS v. Chadha, supra.* Moreover, the Secretary seems to lose sight of the fact that it is the Executive Branch, not Congress, which is to "take care that the laws be faithfully executed." U.S. Const. Art. II, §3, cl. 4.

A look at the congressional oversight of the hearing delay problem reveals that legislative activity has been primarily influenced by repeated agency assurances that administrative steps would reduce the backlog of hearing requests and otherwise resolve the problem. As far back as 1975, in response to congressional skepticism about the agency's goal to hold hearings promptly, the Commissioner of Social Security stated that he expected all hearing decisions to be *made* within 90 days of the request of hearing. The Commissioner further reassured Congress that he viewed this goal as "realistic". *Delays in Social Security Appeals: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 94th Cong., 1st Sess. 74 (1975), quoted in *White v. Mathews*, 559 F.2d at 860, n.10. Indeed, Congress relied upon these representations when it passed legislation providing the additional resources that the Commissioner stated would be necessary to reduce the troubling delays. S. Rep. No. 94-550, 94th Cong., 1st Sess. 3 (1975).

Yet both the problem and legislative concern about it persisted. In 1980 SSA was directed to recommend to Congress "the maximum period of time" within which Title II hearings would be decided. Pub. L. No. 96-265, §308, 94 Stat. 458. As the Secretary mentions (Pr. at 27-28), she submitted a report to Congress providing nationwide maximum *decisional* time limits of 150 days for reconsiderations and 165 days for hearings. However, she fails to point out that these time limits were appended to her report in the form of final regulations "to be promulgated in connection with the *Blankenship* case." Dep't. of HHS, Rep. on the Implementation of §308, Pub. L. No. 96-265, Time Limitations for Decisions on Title II Benefit Claims (1980). Indeed, the regulations and report submitted to Congress were accompanied by a letter in

which the agency stated that it was "specifying the time limits which we believe are realistic, which we plan to achieve, and for which we expect to be held accountable." Subcomm. on Social Security of the House Comm. on Ways and Means, 97th Cong., 1st Sess., App. C at 45 (Comm. Print 97-3 1981). Such assurances were hardly calculated to prompt Congress to believe that the unacceptable hearing delay problem was not close to an administrative resolution. Neither, of course, did they signal the need for legislative action.[43]

In late 1981 the Associate Commissioner for Hearings and Appeals told Congress that:

> If OHA [Office of Hearings and Appeals] is successful in obtaining the additional resources it requires, and if productivity improves in line with my expectations, by the end of Fiscal Year 1983 our pending caseload will drop to the point where processing delays due to backlog are minimal.[44]

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[43] The failure of Congress to take additional actions must be viewed against the backdrop of the Secretary's decision to remedy the delay problem by the promulgation of these time limit regulations. As we noted at n.38, *supra*, the *Blankenship* district court approved the Secretary's own final time limit regulations for publication. On November 30, 1981, however, the Secretary advised the court that it would not promulgate the regulations after all. *Blankenship v. Sec'y of HHS*, 532 F. Supp. at 73. Even at this point, Congress could have expected further administrative actions to address the problem, for the agency announced that it would instead promulgate processing goals. *Ibid.* But no such goals have been forthcoming, a development the Secretary erroneously seems to blame on the *Blankenship* district court. (Br. at 28, n.34).

[44] *Social Security Appeals and Case Review Process: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 97th Cong., 1st Sess. 18 (1981). The Commissioner of Social Security later referred to this reassuring testimony when asked by the House Appropriations subcommittee whether he had brought the "serious problem with processing hearings and appeals" to the attention of the Ways and Means Committee. *Dep'ts. of Labor, HHS, Education, and Related Agencies Appropriations for 1983: Hearings Before a Subcomm. on the House Comm. on Appropriations*, 97th Cong., 2d Sess. 635 (1982).

No resources were withheld. In fact, Congress has never used its power of the purse to block the Secretary from obtaining sufficient resources to deal with delays in the administrative process. To the contrary, Congress has appropriated virtually all sums sought by the Secretary to administer Title II of the Social Security Act. *Dep'ts. of Labor, HHS, Education, and Related Agencies Appropriations for 1984: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 98th Cong., 1st Sess. 867 (1983) (hereinafter, *1984 Appropriations*). Moreover, Congress has on several occasions expressed its willingness to provide the Secretary with additional resources to meet her statutory obligations, "including the maintenance of an adequate staff so that reasonable case-processing times exist at all levels of adjudication." House Comm. on Ways and Means, Report on the Disability Amendments of 1982, H.R. Rep. No. 97-588, 97th Cong., 2d Sess. 20 (1982); *see, also, Disability Investigation Program: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 97th Cong., 2d Sess., Serial 97-90, at 15-16 (remarks of Chairman Pickle).

Nonetheless, the agency continues to advise Congress that its appropriations request "is something that will be adequate and will allow us to make significant improvements in the overall process." *1984 Appropriations, supra*, at 583; *see, also, id.* at 528, 659, 873, 891. While Congress may have had "full knowledge of the disability caseload" (Br. at 32), it has also received repeated assurances of imminent administrative resolution of the problem of hearing delays. In fact in her most recent annual report, the Secretary again stated that despite increasing workload, internal improvements would enable her "not only to handle current hearing requests but also to start reducing the pending caseload." Dep't. of HHS, Social Security Administration, Ann. Rep. to the Congress 9 (1983).

In sum, Congress has been well assured by SSA that significant progress will be made in resolving the hearing delay crisis, and well aware that several courts have addressed the problem by imposing time limit standards.

Yet Congress has not taken any action explicitly or implicitly addressing either objective time limits under §205(b), or the nature of such judicial relief.[45] Accordingly, the objective time limits imposed by the district court have not been barred nor even frowned upon by Congress.

III. PROSPECTIVE INTERIM PAYMENTS REPRESENT A LEGITIMATE EXERCISE OF A COURT'S POWER TO INSURE THAT ITS ORDER IS OBEYED AND TO PROVIDE SOME RELIEF TO WRONGED DISABILITY CLAIMANTS.

The goal of the respondents in this action has been to obtain reasonably expeditious action upon their disability appeals. J.A . 24-25. In imposing flexible time limit relief to bring about compliance with §205(b), however, the district court recognized that its remedy would have little meaning to the very persons it is designed to protect in the absence of compliance by the agency. In its concern with implementing a solution that "most appropriately balances the administrative difficulties in implementing this order and the financial needs of deserving claimants," Pet. App. E at 31a, the court decided in its discretion that an interim payment device was necessary to insure that the Secretary processed appeals without unreasonable delay.[46]

[45] Indeed, proposed legislation relating to the interim payment remedies used to enforce some court's time limits failed to pass Congress. *See, infra*, at n.50.

[46] The interim payment device is designed exclusively to fulfill the need for expedition in §205(b). Any compensation to a disability claimant that may on occasion be required by this enforcement mechanism is best described only as an "interim payment" not a "disability insurance benefit." In its discretion, the district court could as easily have chosen the sum of $100 per month, or $500, or utilized any other alternative approach to secure compliance. *See, e.g., Rodriquez v. Swank*, 496 F.2d 1110, 1113 (7th Cir. 1974), *cert. denied*, 419 U.S. 885 (1974). A fully recoupable sum equivalent to the amount of benefits otherwise due, however, represented a reasonable accomodation, easy to administer.

To achieve a proper balance, the court provided that its enforcement mechanism would be:

—prospective only;

—fully recoupable;

—initiated only after future violations of both §205(b) and the time limits designed to prevent *unnecessary* delay;

—inapplicable or terminable in the event of delay caused by the claimant or necessary developmental steps in the process;

—initiated, in the event of reconsideration delay (if ever), only after the passage of a 180 day time period which is twice the 90 day limit that the court concluded to be the far edge of reasonableness in the typical case.

Pet. App. E at 30a - 31a and App. F at paragraphs 6 and 7.

As we have already noted in Part II A, the district court also balanced its time limitation device with numerous appropriate exceptions. Given the substantial documented harm suffered by disabled persons experiencing lengthy delay, *see supra* at 3-4, 26-27, additional limitations built into the interim payment mechanism show that the court was extremely solicitous of the Secretary's needs and concerns. For example, the Secretary has 90 days to render reconsideration determinations in routine cases not involving new medical development or claimant activity that slows processing, Pet. App. F at paragraph 2; but even upon failing to comply with this requirement, she would not have to make payment unless an additional 90 days passes without a decision. *Id.* at paragraph 6. Thus, the court's remedy requires disability claimants at the initial phase of a four-layered appellate process to bear the full cost of delay for a six month period. In light of the court's findings that the delays were virtually never caused by claimants and that hearing reversal rates exceed 56%, the

interim payment device can hardly be said to be balanced against the Secretary.

In constructing the relief at issue here, the district court exercised its traditional discretionary power to assure a cessation of violations of federal law. *See, e.g., J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964) (there is "a duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose.") Furthermore, "the historic injunctive process was designed to deter, not to punish," *Hecht Co. v. Bowles*, 321 U.S. at 329. Of course, monetary payments contingent upon noncompliance with an injunction represent a traditional means of enforcement by deterrence.[47] Without impacting on the rights of claimants elsewhere and with but one documented instance of a need to make an actual payment, App. at paragraphs 1 and 2, the enforcement mechanism has had its intended effect of compelling the compliance with §205(b) in Vermont that previously was achievable yet unachieved. The "consequence of the injunction" confirms the propriety of the remedial approach. *Califano v. Yamaski*, 442 U.S. at 697; *see, also, id.* at 705.

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[47] *United States v. United Mine Workers*, 330 U.S. 258, 303-04 (1947); *Hutto v. Finney, supra*, 437 U.S. at 690 ("Many of the court's most effective enforcement mechanisms involve financial penalties.") The Secretary has earlier suggested that monetary payments against her must "rest on the court's exercise of its contempt power." Reply Memo for the Pet'r at 5, n.2 (Apr. 1983). But she does not suggest what would be gained by repetitive contempt proceedings. Indeed, numerous courts have anticipated and alleviated problems of noncompliance with injunctions by including financial incentives that prevent the need to reenter the courtroom for ministerial contempt determinations. *See, e.g., Smith v. Miller, supra*, 665 F.2d at 175, 177; *Rodriquez v. Swank, supra*; Alexander v. Hill, 707 F.2d 780, 783 (4th Cir. 1983), *petition for cert. pending sub nom. Syria v. Alexander*, No. 83-163; *White v. Mathews, supra; Barnett v. Califano, supra; Blankenship v. Sec'y of HHS, supra; Crosby v. SSA, supra; Williams v. Schweiker*, 562 F. Supp. 149 (E.D. Mo. 1983).

In addition to assuring protection of respondents' statutory rights by inducing timely hearings, interim monetary payments are a particularly appropriate device because they do not involve the district court in the supervision of day-to-day operations of the agency. Rather they leave it to the Secretary to determine how to run her agency in a way that complies with her statutory mandate. Indeed, at least since the *White* and *Barnett* decisions, *supra*, she has had procedures in place to administer the interim payment device whenever necessary.

In spite of the balance and effectiveness that the device lends to the district court's remedy, the Secretary contends that the court has no authority under Title II to impose such an enforcement mechanism because such payments are barred by specific provisions of the Act itself. Her argument is based entirely upon her characterization of interim payments as disability insurance benefits, however, and is therefore misplaced. By ignoring the fact that the interim payment device is merely a mechanism designed to achieve compliance with a court order, the Secretary's reliance on various sections of the statute treats each out of context.

Thus, 42, U.S.C. 405(i) simply provides the procedure for certification and payment from the Social Security Trust Funds after a proper finding of eligibility under 42 U.S.C. §423(a)(1) and contains no substantive restrictions on the equitable power of a trial court to assure compliance with both §205(b) and other aspects of its remedy.[48] The same is true of 42 U.S.C. 405(q) which

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[48] Neither court below required that any interim payment should come from the Trust Funds. Certainly, the limiting factors in the district court's order will safeguard against the possibility of adverse impact.

On the other hand, the lengthy deprivation of Title II disability benefits frequently imposes a drain on the public treasury elsewhere. In *Mathews v. Eldridge*, 424 U.S. at 324, n. 27, this Court recognized that the absence of such benefits may be partially offset by state and local welfare benefits or food

presumes a prior finding of substantive eligibility and primarily exists to provide a procedure for the replacement of lost or erroneously unpaid old age and survivor's benefits. Moreover, nothing in the January 12, 1983 Social Security Act amendment temporarily authorizing continuing disability benefits to those who appeal disability cessation determinations is inconsistent with the remedial order below.[49] A "special concern" of Congress to provide protection to those persons situated similarly to a small part of the Vermont class here can hardly be construed as a legislative rejection of the balanced relief granted below.[50]

As the Secretary indicates, the legislative history of the Disability Amendments of 1983 reveals a continuing belief that each "disability claimant is entitled to a timely hearing." Br. at 29 quoting H.R.. Rep. No. 97-588 at 19. While reaffirming the "need for expedition", Congress *expanded* protections for claimants in response to an avalanche of horror stories.[51] In arguing that Congress delib-

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stamps. More intangible societal costs engendered by unreasonable delay, of course, are incalculable. Moreover, in the welfare context this Court has noted that development of prompt and skillful procedures will reduce "much of the drain on fiscal and administrative resources." *Goldberg v. Kelly*, 397 U.S. at 266.

[49] *See*, Pub. L. No. 97-455, §2, 96 Stat. 2498, adding 42 U.S.C. §423(g), discussed in the Sec'y's Br. at 4 and 49. About 8% of the respondent class consists of beneficiaries appealing cessation determinations.

[50] *See Merrill Lynch, Pierce, Fenner and Smith v. Curran, supra*, 456 U.S. at 384 and 394 and n.100. The Secretary's contrary citation to H.R. Rep. No. 97-588 (Br. at 49, n.47) is seriously misleading. That report was not prepared in conjunction with the legislation that was enacted on Jan. 12, 1983. Instead it was a report for a 1982 bill that would have amended §205 to prohibit interim payments in the absence of a final determination of benefit eligibility. *See* H.R. 6181, H.R. Rep. No. 97-588, 97th Cong., 2d Sess. §11(d) (1982). Most significantly and unfortunately for the Secretary's argument here, the bill failed to pass either house.

[51] *See, e.g.*, 128 Cong. Rec. H 9658-60 (daily ed. Dec. 14, 1982) (remarks of Reps. Conte and Hammerschmidt).

erately intended to undercut similar relief that was crafted in light of a unique factual record in favor of Vermont claimants who were denied the protections of the Act, the Secretary seriously misconstrues both the purpose of the 1983 amendments and the beneficial purpose underlying the statute. *See Bob Jones University v. United States*, U.S. , 76 L. Ed. 2d 157, 170, 51 U.S.L.W. 4593 (1983).

The Secretary also argues that even if there is not a specific bar, the absence of express congressional authorization for interim payments requires a holding that the district court's enforcement mechanism is barred by sovereign immunity principles. Br. at 46-47. She ignores however, the basic dichotomy, for purposes of sovereign immunity, between retroactive awards and prospective payment orders. This Court has emphatically stated that:

> *a federal court's remedial power*, consistent with the Eleventh Amendment, *is necessarily limited to prospective injunctive relief*, Ex parte Young, supra, and may not include a retroactive award which requires the payment of funds from the state treasury.[52]

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[52] *Edelman v. Jordan*, 415 U.S. 651, 676 (1974) (emphasis added). Principles underlying state immunity under the Eleventh Amendment derive from the same principles governing the federal government's sovereign immunity. *Id.* at 660 and n.9; *Fla. Dept. of State v. Treasure Salvors*, ___U.S.___, 73 L. Ed. 2d 1057, 1070 n.21, 50 U.S.L.W. 5056 (1982); *Monaco v. Miss.*, 292 U.S. 313, 321-27 (1934); Field "The Eleventh Amendment and Other Sovereign Immunity Doctrines," 126 *U. Pa. L. Rev.* 515, 517 (1978); Jaffe, "Suits Against Governments and Officers: Sovereign Immunity", 77 *Harv. L. Rev.* 1, 21 (1963).

Fiscal consequences that are necessitated by compliance with prospective decrees represent but an ancillary effect that is both permissible and often inevitable.[53]

Thus, the cases relied upon by the Secretary do not apply. Both *United States v. Testan*, 424 U.S. 392 (1976) and *Army and Air Force Exchange Service v. Sheehan*, 456 U.S. 728 (1982) involved attempts by former federal employees to acquire retroactive back pay. This Court viewed such claims as damages actions to which the government had never consented. On the other hand, judicial relief that would have had an ancillary effect of prospective wage reinstatement was clearly distinguished as allowable. *Testan*, 424 U.S. at 401 n.5 and 403. More recently in *United States v. Mitchell*, U.S. , 77 L. Ed. 2d 580, 51 U.S.L.W. 4999, 5005 (1983), this Court again affirmed that prospective equitable remedies against federal officials are fully justified.

Finally, the Secretary's reliance upon *Schweiker v. Hansen*, 450 U.S. 785 (1981), lends no support to her argument either. The only issue there was whether a claimant could retroactively be determined eligible for statutory benefits under an estoppel theory notwithstanding her failure to comply with the application requirement of the Act. In sharp contrast, the question here is whether a court may devise a prospective order that eliminates the Secretary's own noncompliance with the Act by insuring that timely hearings are provided. Likewise, compliance with the court order that both the record below and subsequent developments have proven to be easily within the Secretary's capacity will prevent any needless charge on the public treasury, in the form of either interim payments or the state and federal public assistance benefits that the disabled often receive in their stead.[54]

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[53] *Id.* at 667-68; *see, also, Ex parte Young*, 209 U.S. 123 (1908); *Milliken v. Bradley*, 433 U.S. 267, 289 (1977); *Graham v. Richardson*, 403 U.S. 365 (1971); *Goldberg v. Kelly, supra; Quern v. Jordan;* 440 U.S. 332, 337 (1979).

[54] The citation to *INS v. Miranda*, (Br. at 48), another estoppel case, is inapposite as well. There is both a statutory requirement of reasonably prompt processing and ample evidence of unwarranted delay in the instant case, unlike the absence of such in *Miranda*, ___U.S.___, 74 L. Ed. 2d 12, 16 (1982).

In the end, the Secretary points to no authority that undermines the unique effectiveness of the interim payment mechanism. The devise is fully consistent with the exercise of discretionary remedial powers by a trial court and it provides a perfect "fit" between the wrong and the remedy.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,
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Vermont Legal Aid, Inc.
COUNSEL FOR RESPONDENTS

September 26, 1983

Of Counsel:
Henry A. Freedman, Esq.
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Center on Social Welfare
Policy and Law, Inc.

APPENDIX

DEPARTMENT OF HEALTH & HUMAN SERVICES

Social Security Administration
Region 1
John F. Kennedy Federal Bldg.
Government Center
Boston, MA 02203

March 29, 1983

Mr. Richard H. Munzing
Staff Attorney
Vermont Legal Aid, Inc.
Bank Block, Main Street
Springfield, VT 05156

Dear Mr. Munzing:

I have received your recent correspondence concerning our Manchester, New Hampshire, Hearing Office that services all of Vermont as well as New Hampshire.

In response to your specific questions, I am listing the following information in the same sequence as shown in your letter:

1. Only two cases have required the payment of interim benefits under the Day and Barnett Court Orders; one in January 1983, and the other in August 1982, respectively.

2. No cases have been transferred to other hearing offices from Manchester due to the Barnett or Day Court Orders. An Administrative Law Judge was transferred to Manchester due to growing workloads.

3. The fourth ALJ was added to the Manchester staff in June of 1980 due to increasing receipts.

4. The placement of ALJs is done by our Central Office in Arlington, Virginia, based on workload needs.

There is no ceiling on the number of ALJs. There is a staffing ceiling on support staff. The Manchester Office is now at its support staff ceiling so that no hiring is being done at this time.

5. There is no quota regarding the number of monthly dispositions established for ALJs in this region. However, the average disposition per ALJ for the Manchester Office is 32.3 per month. Total clearances for Manchester in 1982 was 1,554 cases.

6. The ratio of support staff to ALJ in Manchester is 4.1 to 1. There is no official "goal" established by OHA against which this ratio can be evaluated.

7. Our office is not involved in the reconsideration process which is handled by the Social Security District Offices and the State Agencies. Information on reconsiderations would have to be obtained through the Regional Commissioner of Social Security Robert C. Green, Room 1100, John F. Kennedy Federal Bulding, Boston, MA 02203.

If we can be of any further assistance, please feel free to contact us at any time.

Sincerely yours,

David K. Ronka
Regional Management Officer
Office of Hearings and Appeals

Office - Supreme Court, U.S.
FILED
NOV 28 1983
ALEXANDER L. STEVAS,

No. 82-1371

In the Supreme Court of the United States

OCTOBER TERM, 1983

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

LEON S. DAY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Washington, D.C. 20530
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TABLE OF AUTHORITIES

Cases: Page

Alexander v. *Hill*, 707 F.2d 780, petition for cert. pending, No. 83-163 19
Batterton v. *Francis*, 432 U.S. 416 17
Blankenship v. *Secretary of HEW*, 587 F.2d 329 9
California Department of Human Resources Development v. *Java*, 402 U.S. 121 11
Carey v. *Piphus*, 435 U.S. 247 20
EEOC v. *Wyoming*, No. 81-554 (Mar. 2, 1983) 10
Fusari v. *Steinberg*, 419 U.S. 379 11
Heckler v. *Campbell*, No. 81-1983 (May 16, 1983) 16, 17
INS v. *Miranda*, No. 82-29 (Nov. 8, 1982) 13
Mathews v. *Eldridge*, 424 U.S. 319 15
Richardson v. *Perales*, 402 U.S. 389 15
Rodriguez v. *Swank*, 496 F.2d 1110, cert. denied, 419 U.S. 885 19
Schweiker v. *Gray Panthers*, 453 U.S. 34 17
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Smith v. *Miller*, 665 F.2d 172 19
United States v. *Mitchell*, No. 81-1748 (June 27, 1983) 20
United States v. *Testan*, 424 U.S. 392 20
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Constitution, statutes and regulations:

U.S. Const. Art. I, § 9, Cl. 7 19
Social Security Act:
Title II, 42 U.S.C. (& Supp. V) 401 *et seq.*:
42 U.S.C. (Supp. V) 401(g)(1)(A) 17
42 U.S.C. 405(a) 14, 16
42 U.S.C. (Supp. V) 405(b) 3, 4, 7, 8, 11, 16, 18
42 U.S.C. (Supp. V) 405(g) 2
42 U.S.C. 405(i) 18
42 U.S.C. 405(q) 4, 18
42 U.S.C. (& Supp. V) 421 17
42 U.S.C. (Supp. V) 421(a) 10, 11, 14, 16
42 U.S.C. (Supp. V) 421(a)(2) 10

Constitution, statutes and regulations—Continued: Page

42 U.S.C. (Supp. V) 421(a)(2)(C) 11
42 U.S.C. (Supp. V) 421(c) 10, 14
42 U.S.C. (Supp. V) 421(e) 17
42 U.S.C. (& Supp. V) 423(a)(1) 18

Title III, 42 U.S.C. (& Supp. V) 501 *et seq.*:

42 U.S.C. 503(a)(1) 11

Title XVI, 42 U.S.C. 1381 *et seq.*:

42 U.S.C. 1383(a)(4) 5
42 U.S.C. 1383(a)(4)(B) 4, 5
42 U.S.C. 1383(c)(2) 4

Social Security Disability Amendments of 1980, Pub. L. No. 96-265, 94 Stat. 441 *et seq.* 8
Pub. Law No. 97-455, 96 Stat. 2497 *et seq.* 6, 18
§ 2, 96 Stat. 2498 6
§ 4, 96 Stat. 2499 6
Pub. L. No. 98-118, § 2, 97 Stat. 803 6
20 C.F.R.
Section 404.1502 15
Section 404.1503 15
Section 404.1527 15

Miscellaneous:

Annual Report of the Director of the Administrative Office of United States Courts (1982) 2
Attorney General's Committee on Administrative Procedure, *Administrative Procedure in Government Agencies*, S. Doc. 10, 77th Cong., 1st Sess., Pt. 3 (1941) 7, 8, 16
Book Review, *Bureaucratic Vision*, 96 Harv. L. Rev. 1952 (1983) 8, 18
129 Cong. Rec. (daily ed. Nov. 18, 1983):
pp. H10620-H10621 7
pp. S16855-S16858 7
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p. 12837 9
p. 12937 9

Miscellaneous—Continued: Page

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H.R. 6181, 97th Cong., 2d Sess. (1982) 6
H.R. 3391, 98th Cong., 1st Sess. (1983) 7
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H.R. Rep. 97-588, 97th Cong., 2d Sess. (1982) 2, 6
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J. Mashaw, *Beaucratic Justice* (1983) 18
Note, *Judicial Resolution of Systemic Delays in Social Security Hearings*, 79 Colum. L. Rev. 959 (1979) 18
Office of Hearings and Appeals, U.S. Dept. of Health and Human Services, *Key Workload Indicators, September 1983* (Oct. 26, 1983) 2, 3
S. 476, 98th Cong., 1st Sess. (1983) 7
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SSN, U.S. Dept. of Health and Human Services, *Office of Hearings and Appeals Handbook* (*OHA Handbook*) (Apr. 1982) 16

In the Supreme Court of the United States

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MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

LEON S. DAY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Respondents' position suffers from two fatal flaws. First, respondents provide no answer to the argument that the 90-day time limits imposed by the district court are flatly inconsistent with the deliberate judgment by Congress and the Secretary *not* to impose fixed deadlines on the processing of disability claims because of their concern that such deadlines would adversely affect the quality of adjudication. Second, respondents ignore the fact that the Social Security disability program is nationwide in scope and was intended by Congress to be administered on a uniform basis throughout the country. Their attempt to justify the time limits and interim benefits imposed by the courts below on the ground that they depend upon fact-bound determinations and affect only the State of Vermont therefore must be rejected.

Affirmance of the judgment below, when combined with similar judicial decrees that have been entered elsewhere and others that surely would follow, would lead to a further disruption and balkanization of the nationwide disability program and to the further accretion of deadlines that almost certainly could not be met if applied to the ever expanding caseload, at least not without substantial cost to the fairness and accuracy of the decision-

making process. Data recently compiled by HHS for the fiscal year ending September 30, 1983 show that the number of requests for ALJ hearings under the Social Security Act increased by more than 40,000 over the number for the previous year, to a record total of 362,223—a five-fold increase over the 72,202 hearing requests just a decade earlier.[1]

The Social Security program thus far has successfully absorbed the extraordinary increase in hearing requests through the combination of additional resources furnished by Congress and improved administration by the Secretary, with the result that the average time required for a claimant to receive an ALJ decision has not been substantially extended by the huge caseload.[2] This greatly enhanced productivity is reflected in data showing that at the end of fiscal year 1983, the average number of cases decided by each ALJ each month stood at 45 (or an average of two cases each working day), a dramatic increase over the average of 34 cases decided per month at the end of fiscal year 1982 and 14 per month in fiscal year 1973.[3] But the productivity of the ALJs, who

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[1] Office of Hearings and Appeals, U.S. Dep't of Health and Human Services, *Key Workload Indicators, September 1983*, at 1 (Oct. 26, 1983). We have lodged a copy of the September 1983 edition of the monthly *Key Workload Indicators* with the Clerk of this Court.

[2] The average waiting period for an ALJ decision was 174 days in fiscal year 1973 and 183 days at the end of fiscal year 1983. See *Key Workload Indicators, September 1983, supra* note 1, at 1. As the House Ways and Means Committee observed in 1982 when it recommended against enactment of fixed deadlines for the processing of claims, these periods compare favorably to the average time taken by federal district courts to dispose of Social Security cases under 42 U.S.C. (Supp. V) 405(g). See H.R. Rep. 97-588, 97th Cong., 2d Sess. 19-20 (1982) (quoted in Gov't Br. 29-30). During the 12 months ending June 30, 1982, the average time for a decision by the district courts was 11 months, and 10% of the cases required more than 26 months for disposition. *Annual Report of the Director of the Administrative Office of United States Courts* 252 (1982). This is so even though the district courts, unlike ALJs, do not conduct de novo hearings on the claims.

[3] *Key Workload Indicators, September 1983, supra* note 1, at 1.

have an average of 228 cases on their dockets,[4] obviously cannot be increased much further in order to eliminate the nationwide backlog of pending cases and meet judicially imposed deadlines without also sacrificing the quality of decisions.

What constitutes a "reasonable * * * opportunity for a hearing" within the meaning of 42 U.S.C. (Supp. V) 405(b) must be determined not in the abstract, as respondents suggest, but by reference to the terms and manner of implementation of the Social Security Act itself, of which 42 U.S.C. (Supp. V) 405(b) is a part. Respondents, like all the courts that have considered the question (Gov't Br. 37-38), do not challenge the Secretary's good faith in attempting to dispose of the backlog of pending cases or the validity of the procedures adopted by her and by Congress to adjudicate claims. Moreover, Congress has been fully aware over the last decade of the timing of ALJ hearings and, pursuant to authorization in the Social Security Act itself, has allocated resources to support the adjudication process at a particular level each year. Processing times that are such an entrenched feature—and direct and foreseeable consequence—of the conscientious implementation of the Social Security Act by Congress and the Secretary cannot be held to violate that very Act. Accordingly, we submit that the Secretary fully satisfies her obligation under 42 U.S.C. (Supp. V) 405(b) to afford claimants "reasonable * * * opportunity for a hearing" by diligently processing more than 360,000 hearing requests annually in accordance with those established procedures and priorities and within the limits of available resources.

1.a. Respondents make virtually no effort to answer the showing in our opening brief (Gov't Br. 19-31) that Congress, with full awareness of the size of the pending caseload and the time required to obtain an ALJ decision, repeatedly has eschewed fixed deadlines for the processing of disability claims because of its recognition that disability determinations are often time-consuming

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[4] *Key Workload Indicators, September 1983, supra* note 1, at 1.

and its belief that fixed deadlines could adversely affect the quality of adjudications. For example, respondents' only reply to our reliance (Gov't Br. 21-22) on the fact that Congress expressly excluded disability cases from the requirement in 42 U.S.C. 1383(c)(2) that an ALJ render his decision within 90 days of the hearing request is that the Section is irrelevant because it applies to claims for SSI benefits under Title XVI, not claims for disability benefits under Title II, which are involved in this case. See Resp. Br. 37-38. This response misses the point. Congress imposed a 90-day deadline for ALJ decisions in SSI cases because eligibility for SSI benefits is based on need and expeditious treatment therefore was thought to be appropriate; yet even in that context Congress excluded disability cases from the deadline (Gov't Br. 21-22). A fortiori, under Title II, where eligibility is *not* based on need, the general language in 42 U.S.C. (Supp. V) 405(b) referring to a "reasonable * * * opportunity for a hearing" cannot be read to support judicial imposition of fixed deadlines in disability cases.

b. Respondents also do not dispute our submission (Gov't Br. 22, 48) that the exclusion of disability cases from the provision in 42 U.S.C. 405(q) for expedited payment of benefits under Title II reflects a congressional judgment not to force a hasty decision in Title II disability cases through imposition of arbitrary deadlines. Instead, respondents attempt to avoid the obvious import of 42 U.S.C. 405(q) for their own Title II claims by citing (Resp. Br. 38-39) a different Section of the Act, 42 U.S.C. 1383(a)(4)(B), which provides for accelerated payments not under Title II, but under the SSI program. Section 1383(a)(4)(B) permits the Secretary to pay benefits for up to three months to persons who have applied for SSI benefits on the basis of disability or blindness, pending a decision on their applications. This Section, respondents contend, reflects a congressional intent to expedite the decision in disability cases generally. In fact, however, it reflects the opposite intent. The legislative history of 42 U.S.C. 1383(a)(4)(B) makes clear

that it was enacted "in recognition of the fact that in some cases *additional* time is needed to obtain and evaluate medical and other evidence to establish disability" and of the need for a mechanism to cover an SSI applicant's living expenses during that time. S. Rep. 92-1230, 92d Cong., 2d Sess. 391 (1972) (emphasis added).[5]

Moreover, the payment may be made to SSI claimants under 42 U.S.C. 1383(a)(4)(B) only if the applicant is "presumptively disabled or blind and is determined to be otherwise eligible for such benefits" (42 U.S.C. 1383(a)(4)(B)). The payment of interim benefits under the district court's order in this case is not based on any comparable prima facie showing of entitlement; to the contrary, all of the members of the class were determined *not* to be disabled. Respondents quote (Resp. Br. 38-39) language from the Senate report on 42 U.S.C. 1383(a)(4) stating that, in order to avoid any disruption in benefits, the Committee "expects that the Secretary will make the initial determination of disability before the end of the 3-month period." S. Rep. 92-1230, *supra*, at 391. This case, however, involves not the initial determination stage of the process mentioned in the Senate report, but reconsiderations and ALJ hearings that are conducted after the State agency has completed the initial determination and found that the claimant is not disabled. Congress included no processing deadlines or interim benefits requirement for reconsiderations and ALJ hearings in disability cases even under the SSI program, let alone under Title II.

c. Respondents also ignore the significance of the special disability amendments passed by Congress in 1982 in

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[5] Congress presumably did not provide a parallel authorization for payments to cover living expenses during the extended time sometimes required for the processing of new applications for disability benefits under Title II of the Act, involved here, because those benefits are not based on need. Congress has, however, provided for the payment of interim benefits through the ALJ stage under Title II for persons who previously had been receiving benefits but whose disability was found by the State agency to have ceased. See pages 5-7, *infra*.

Sections 2 and 4 of Pub. L. No. 97-455, 96 Stat. 2498 and 2499, which they treat as only of marginal relevance. See Resp. Br. 39, 47-48. These amendments are directly relevant, however, because Congress there addressed the very issue of the timing of ALJ hearings and interim benefits that respondents raise in this case. In the 1982 amendments, Congress responded to what it perceived to be the special hardship experienced by one subcategory of disability claimants while their cases are under administrative review—those claimants, like respondents Day and Maurais, who previously were receiving benefits and became dependent upon them but whose benefits were terminated after an initial determination by the State agency that their disability had ceased. But Congress acted not, as respondents urge this Court to do, by requiring that all ALJ hearings be held within a fixed period of time and that all claimants—new applicants as well as prior recipients—receive benefits if the arbitrary deadlines are not met.[6] Congress left the ALJ hearing process undisturbed and chose instead to provide a separate opportunity for a hearing at the earlier reconsideration stage and to authorize payment of interim benefits through the ALJ stage in the narrow category of disability cessation cases, without regard to the amount of time required to hold an ALJ hearing (Gov't Br. 29-30).[7]

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[6] The House report on the bill that formed the basis for the 1982 legislation specifically disapproved of fixed processing deadlines because they might lead to incorrect decisions. H.R. Rep. 97-588, 97th Cong., 2d Sess. 19-20 (1982) (quoted at Gov't Br. 29-30). Contrary to respondents' assertion (Resp. Br. 47 n.50), the House report is directly pertinent to the amendments passed by Congress in Public Law No. 97-455 because it discusses the provisions of a bill (H.R. 6181, 97th Cong., 2d Sess. (1982)) that later were included in Public Law No. 97-455. See H.R. Rep. 97-588, *supra*, at 8-9, 11-15.

[7] As we have explained in our opening brief (Gov't Br. 4 n.3), the temporary interim benefits authorization enacted in Section 2 of Pub. L. 97-455 applies only to disability termination cases in which an initial determination was made prior to October 1, 1983. That authorization was temporarily extended to December 7, 1983 by Section 2 of Pub. L. No. 98-118, 97 Stat. 808. The House Committee on Ways and Means recently reported a bill (H.R. 4170,

Once again, then, Congress demonstrated that when it has perceived a need to alleviate hardship that might be experienced by certain claimants as a result of the passage of time during administrative review of a claim, it has included special remedial provisions in the Social Security Act itself. Congress did not enact any such measures, however, for persons who have filed new applications for benefits and therefore have not yet become dependent upon the receipt of benefits.[8] Respondents therefore plainly err in contending that courts may impose such requirements under the general language in 42 U.S.C. (Supp. V) 405(b).[9]

98th Cong., 1st Sess. (1983)) that would make permanent the statutory authorization for interim benefits through the ALJ stage in disability cessation cases. See H.R. Rep. 98-432, 98th Cong., 1st Sess. 423-424, 1151-1152 (1983). Similar bills have been introduced in the Senate, but no action has yet been taken on them. S. 476, 98th Cong., 1st Sess. (1983); S. 2002, 98th Cong., 1st Sess. (1983). An amendment to extend the interim benefit authorization for an additional six months beyond December 7, 1983 was added as a floor amendment to a tariff bill passed by the Senate on November 18, 1983 (H.R. 3391, 98th Cong., 1st Sess.; 129 Cong. Rec. S16855-S16858 (daily ed. Nov. 18, 1983)), but the House of Representatives failed to consider the bill under a unanimous consent agreement after a Member raised an objection (129 Cong. Rec. H10620-H10621 (daily ed. Nov. 18, 1983)).

[8] Such persons, as respondents concede (Resp. Br. 47 n.49), comprise the vast majority (approximately 92%) of the members of the class in this case.

[9] Respondents contend (Resp. Br. 13-16) that the report prepared by the Social Security Board in 1939 supports the decisions below. See Attorney General's Committee on Administrative Procedure, *Administrative Procedure in Government Agencies*, S. Doc. 10, 77th Cong., 1st Sess., Pt. 3 (1941). As respondents concede (Resp. Br. 15 n.11), however, that report establishes that the Board recognized fairness, uniformity, and accuracy of decisions to be important features of the hearing process under 42 U.S.C. (Supp. V) 405(b). S. Doc. 10, *supra*, at 36-38. The Board's discussion upon which respondents rely shows only that the Board believed that the need for expedition was another aspect of the administrative task. This is entirely consistent with our submission that timing is merely one aspect of the statutorily required "reasonable * * * opportunity for a hearing." In any event, since 42 U.S.C. (Supp. V)

d. Finally, respondents try to explain (Resp. Br. 39-43) Congress's decision not to enact statutory time limits on the numerous occasions in 1975 and thereafter in which it has considered the question (see Gov't Br. 22-31) by referring to statements by HHS officials that they expected eventually to reduce the backlog of ALJ hearing requests and the time taken to process them. As we have shown (Gov't Br. 23-24), however, the background of the 1975 legislation also reflects concern that processing deadlines would adversely affect the quality of adjudication, and subsequent legislative materials have stressed that concern as Congress's reason for declining to impose fixed deadlines, rather than an expectation that the backlog of cases would soon be eliminated (Gov't Br. 26-30).

In any event, whatever Congress might have projected in 1975, it since has become fully aware of the exploding disability caseload and the resulting processing times that have shown the Secretary's earlier optimism to have been misplaced. In its report to Congress on processing times required by the Social Security Disability Amendments of 1980, Pub. L. No. 96-265, 94 Stat. 441 *et seq.*

405(b) was enacted, Congress has separately addressed the question of timing and expedited payment of benefits in other sections of the Act.

As respondents point out (Resp. Br. 15), the Board's 1939 report expresses the expectation that reconsiderations and hearings would be completed within 30 days of a request. S. Doc. 10, *supra*, at 40-41, 45. Respondents do not suggest that, as a result, 42 U.S.C. (Supp. V) 405(b) itself requires that these steps be completed within 30 days. Such a suggestion would be untenable. The Social Security program is vastly more complex today than it was in 1939. In 1939, the Board predicted an annual hearing caseload of between 5,000 and 20,000 cases, as contrasted to the 362,000 hearing requests in fiscal year 1983. S. Doc. 10, *supra*, at 37. Moreover, although the questions that arose under the old age and survivors program in 1939 typically involved rather straight-forward disputes over the claimant's age, relationship, or earnings records, the overwhelming number of ALJ hearings now are requested in disability cases, which involve far more difficult medical and vocational judgments. Book Review, *Bureaucratic Vision*, 96 Harv. L. Rev. 1952, 1956 n.21 (1983).

HHS proposed much longer time frames than the 90-day limits previously discussed in 1975 and stressed that it could not be sure that even those longer deadlines would be met, in view of budget and staff limitations, projected workload increases, the impact of additional procedural measures mandated by the Disability Amendments of 1980, and the circumstances of individual cases, such as the need to obtain sufficient medical documentation (see Gov't Br. 28 n.34). And soon thereafter, in connection with the litigation on remand from the Sixth Circuit's decision in *Blankenship* v. *Secretary of HEW*, 587 F.2d 329 (1978), the Secretary on November 30, 1981 publicly disavowed the workability of processing deadlines.[10] Con-

[10] Respondents argue (Resp. Br. 22, 31, 33-35) that the courts below were justified in imposing fixed deadlines because the Secretary stated in the past that time limitations represent an appropriate solution to the problem of unreasonable delay. This assertion is misleading. Respondents note that in 1978 there was a goal in Vermont of scheduling ALJ hearings within 90 days (J.A. 50). But the fact that HHS established an internal goal against which to measure its performance does not lend support to a court's imposing mandatory hearing deadlines. Respondents also note that the Secretary proposed regulations in 1980 requiring hearings to be scheduled within 90 days (45 Fed. Reg. 12937). As respondents concede (Resp. Br. 34 n.38), however, the proposed regulations they cite resulted in large part from the remand in *Blankenship* to permit the Secretary to develop regulations as an alternative to the court's imposing its own deadlines (see 45 Fed. Reg. 12837 (1980). In *Blankenship*, of course, the Secretary contended that the processing times then being experienced by claimants were *not* unreasonable and that no remedy, including the promulgation of regulations, was necessary. Respondents also fail to note that the Secretary's proposed regulations contained exceptions from the hearing deadlines not only for situations in which the *claimant* caused a delay, as in the district court's order in this case, but also where the *ALJ* determined that additional evidence was needed or where uncontrollable circumstances were present. 45 Fed. Reg. 12839 (1980). The courts below allowed no such flexibility in this case. See pages 14-15, *infra*. In any event, the Secretary subsequently repudiated support for the concept of fixed processing deadlines of the type involved in *Blankenship*, whether in regulations or court orders.

Finally, respondents refer (Resp. Br. 34-35) to a 60-day time limit contained in regulations proposed by the Secretary to imple-

gress's decision not to adopt fixed deadlines therefore cannot be attributed to a supposed belief that the Secretary would do so administratively or that the hearing backlog was about to evaporate. But even if respondents' unsupported assertion that Congress declined to act for these reasons were correct, that would hardly justify the imposition of processing deadlines by the courts.

2.a. In an effort to avoid the force of the overwhelming indicia of congressional intent not to impose fixed deadlines on the administration of the disability program, respondents assert (Resp. Br. 19-30, 48) that the judgment below nevertheless is warranted by "fact-specific" circumstances in Vermont. This assertion is plainly wrong. The Secretary has been directed by Congress "to assure effective and uniform administration of the disability insurance program throughout the United States." 42 U.S.C. (Supp. V) 421(a)(2). The validity of the manner in which the disability program is administered therefore cannot be measured on a State-by-State basis by particularized fact-finding and ad hoc balancing of factors—*e.g.*, available resources, logistical difficulties, claimant hardship, and the reasons for the time taken to review claims—pertaining to each State in isolation. Cf. *EEOC* v. *Wyoming*, No. 81-554 (Mar. 2, 1983), slip op. 13. This is especially so with respect to ALJ hearings, in which the States play no role.

The Act does provide for the States to make prehearing determinations of disability, subject to review by the Secretary. 42 U.S.C. (Supp. V) 421(a) and (c). The Act also authorizes the Secretary to promulgate

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ment the statutory requirement passed by Congress in 1982 that claimants be afforded an evidentiary hearing at the reconsideration stage in disability cessation cases. 48 Fed. Reg. 36836 (1983); see note 6, *supra*. These proposed regulations do not, however, contain a deadline within which the hearing must be held, as the district court ordered in this case. The 60-day time frame is for rendering a decision *after* the hearing has been held or after the record has been closed if additional evidence is submitted following the hearing. These proposed regulations therefore lend no support to respondents' position.

criteria by which to evaluate a State's performance. The Secretary has discretion to include time limitations in these criteria (42 U.S.C. (Supp. V) 421(a)(2)(C)), although she has not done so for the reconsideration stage (Gov't Br. 45).[11] Since Congress has expressly addressed the question of timing of State disability determinations in 42 U.S.C. (Supp V) 421(a), respondents err in defending court-imposed time limits on reconsiderations by the State of Vermont in reliance on the language of 42 U.S.C. (Supp. V) 405(b) providing for a "reasonable * * * opportunity for a hearing," which does *not* mention reconsiderations, State agencies, or the matter of timing.

b. Although the text of the Act does not support their State-by-State approach, respondents contend (Resp. Br. 39) that Congress's failure to amend the language of 42 U.S.C. (Supp. V) 405(b) to bar the imposition of fixed deadlines after courts had imposed deadlines in certain States indicates that Congress approved of those judicial decisions. Respondents cite nothing in the legislative history to support this assertion, and we are not aware of any support. In fact, the legislative record discussed in Point 1 and in our opening brief (Gov't Br. 23-30) dem-

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[11] Respondents' reliance on *California Department of Human Resources Development* v. *Java*, 402 U.S. 121 (1971), and *Fusari* v. *Steinberg*, 419 U.S. 379 (1975), is misplaced. Those cases concern the timing of payments of unemployment benefits under Title III of the Act. Title III, in contrast to 42 U.S.C. (Supp. V) 405(b), does explicitly address the matter of timing of state decisions by requiring that payments be made "when due." 42 U.S.C. 503(a)(1). Moreover, in *Java*, the Court held that postponement of payment to a claimant who had been found *eligible* for benefits pending the employer's appeal of that decision violated the statute. 402 U.S. at 123, 133. In this case, payment has been withheld because the claimants have been found *not* to be eligible. In *Fusari*, the Court declined to decide the validity of Connecticut procedures under the "when due" requirement because of intervening changes in state law. 419 U.S. at 386-390. We note as well that particular focus on the States' administration was necessary in *Java* and *Fusari* because the unemployment program is entirely administered by the states. The disability program, by contrast, has significant federal involvement at all levels and the ALJ hearing system is entirely federally administered.

onstrates a clear rejection of such deadlines. Reports issued by the staff of the House Committee on Ways and Means in 1981, for example, note the "disruption" caused by the "plethora" of judicial orders imposing time limits, because resources must be shifted from one district to another;[12] explain that the Committee had resisted efforts to put time limits in the Act because of the potential effect on the quality of decisionmaking; and confirm that the provision in the 1980 Disability Amendments for the Secretary to submit a report to assist Congress in studying the matter was "'[i]n lieu of putting such statutory requirements'" in the 1980 Amendments (Gov't Br. 30-31 n.36 (citation omitted)).

c. Not only is there no legal basis for respondents' attempt to support the judgment below by focusing only on the State of Vermont; there is no factual basis for this approach either. The district court's holding that the timing of ALJ hearings in Vermont was not reasonable did not depend on a "fact-specific" balancing of relevant factors in Vermont. The district court relied

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[12] In an attempt to defend the judgment below, respondents rely (Resp. Br. 8 n.6, 26-27 & n.27, 30 n.32) on the fact that the Secretary has been able to comply with the 90-day time limit for holding ALJ hearings in Vermont without transferring ALJs into the state or transferring cases out of the State. Vermont is a small and, in many ways, atypical State; unfortunately, HHS's experience has been different elsewhere. As we have explained in the certiorari petition (Pet. 16 n.17), in order to comply with judicially imposed deadlines in New York in 1980 and 1981, it was necessary to transfer 6,400 cases for decision by ALJs outside the State, and in order to comply with a similar decree in Massachusetts, it was necessary to transfer all new cases while ALJs in the State reduced the then-pending backlog. See also Gov't Br. 30-31 n.36. Such reallocations of resources, which could only be expected to increase if judicially imposed time limits spread to other States, are disruptive and operate to the disadvantage of claimants in other jurisdictions. In addition, as we also have explained in the certiorari petition (Pet. 17), there is substantial variation among the decrees that already have been entered in a number of States, thereby producing disparity even as among the claimants sought to be benefited and creating complex administrative burdens for HHS in seeking to comply with the decrees.

solely on the fact that 43% of the Vermont claimants did not receive a hearing within 90 days. See Pet. App. 17a. The court did not make any further findings of fact with respect to *why* more than 90 days had elapsed in these individual cases, much less determine that the passage of time was not due to reasonable administrative steps in preparing for and scheduling the hearings within the limits of existing priorities, procedures, and resources. Respondents in fact concede (Resp. Br. 8) that the reasons why hearings were not held within 90 days were "unexplained." Respondents likewise cite no facts pertaining to the ALJ hearings generally to support the imposition of such deadlines.[13]

The district court did inquire to a limited extent into the timing of reconsiderations in Vermont, but its analysis was wholly inadequate to sustain the imposition of fixed deadlines even if a State-by-State assessment of the matter were appropriate. The district court relied almost entirely on logs identifying the date on which various steps occurred in each of a sample of 77 reconsideration cases in Vermont. The court found that in 27 of these 77 cases, the decision was rendered more than 90 days after the request for reconsideration, and the court held that these processing times were unlawful because the reasons for them were "unexplained" (Pet. App. 28a). However, a finding that an agency's reasons are "unexplained" does not mean that they are improper. *INS* v. *Miranda*, No. 82-29 (Nov. 8, 1982).[14]

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[13] Respondents repeatedly rely on the fact (Resp. Br. 4, 7, 22, 26) that some delay was occasioned in holding respondent Day's hearing because an SSA employee neglected to initiate the hearing process after receiving a letter from counsel for Day, pending receipt of the appropriate SSA form signed by Day (J.A. 47-48, 57). But this single error—the effects of which would have been mitigated if counsel had not waited almost two months to return the signed form (J.A. 57)—scarcely justifies judicial time limits on all ALJ hearings in Vermont.

[14] In fact, the processing times were not wholly "unexplained." Respondent Day's own case was selected as a quality assurance sample case by SSA in Baltimore and was returned to the Vermont

Moreover, the district court did not dispute the Secretary's assertion that much time often is consumed in the reconsideration process because, *e.g.*, the case file must be located by SSA and sent to the State agency, the State agency often has difficulty in obtaining needed evidence from third parties (such as the claimant's physician), SSA conducts a review of many State decisions before they become final, and limitations in SSA's computerized records system often require additional steps (Pet. App. 28a). The court's only response to the Secretary's concerns was that claimants should not "have to endure delays caused by inefficient agency procedures or unnecessarily lengthy internal quality control checks" (*ibid.*). Congress, however, has vested the Secretary with responsibility for adopting procedures to administer the disability program (42 U.S.C. (& Supp. V) 405(a) and 421(a)) and indeed has required that SSA conduct a quality review of State decisions (42 U.S.C. (Supp. V) 421(c)). A court may not disregard Congress's and the Secretary's considered judgments in this regard—or hold

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agency in order for a neurological consultative examination to be conducted. The various steps in this process—selecting and reviewing the case in Baltimore, sending it to Vermont, scheduling the examination, reviewing the results of the examination, and returning it to Baltimore—account for more than half of the total time (167 days) consumed between Day's request for reconsideration and the decision on reconsideration. Such a quality review is expressly authorized by Congress (42 U.S.C. (Supp. V) 421(c)), and it served the interests of Day as well as the government because he might have been found disabled on the basis of the consultative examination without the need for an ALJ hearing. Similar quality reviews (by SSA or the state agency) were conducted in a number of the 27 sample cases in which more than 90 days elapsed before the reconsideration decision (J.A. 108 (#3), 129 (#45), 133 (#51, #58), 148-149 (#77), 148 (#76)). In others of the 27 cases, delay was occasioned by such factors as unsuccessful attempts to contact the claimant (J.A. 124, 194 (#33), 138 (#57), 137 (#60)), loss of forms by the claimant's attorney (J.A. 125-126 (#36)), the claimant's refusal to cooperate (J.A. 147 (#75)), and failure by the treating physician to respond to requests for information (J.A. 129 (#45), 132 (#49), 135 (#53), 137 (#56)). These delays cannot be attributed to SSA or the State agency.

J.A. 56

unlawful the time ordinarily taken to complete the procedures they have devised—on the basis of its own view that certain steps in the process are "unnecessary" or "inefficient" or by its own post hoc determination that, in isolated cases, those steps might have been completed more quickly.

d. Respondents also argue (Resp. Br. 8-9, 31-32) that the 90-day deadlines imposed by the courts below in Vermont are flexible and accommodating of the Secretary's interests. They are not. The only exceptions from their mandatory terms are for situations in which the *claimant* submits new evidence or requests or causes delay. Under the court's order, a State agency may not postpone a decision on reconsideration past the 90-day deadline on the basis of its own determination that the claimant should undergo a consultative examination unless the claimant agrees to the examination, even though the regulations provide that the State agency has the authority to obtain additional evidence or to order a consultative examination (Pet. App. 30a, 33a). 20 C.F.R. 404.1502, 404.1503, 404.1527. See *Richardson* v. *Perales*, 402 U.S. 389, 393-394 (1971); *Mathews* v. *Eldridge*, 424 U.S. 319, 338 n.20 (1976).

Similarly, the ALJ hearing date may not be continued beyond the 90-day deadline even where the ALJ believes it is necessary to gather additional medical evidence (Pet. App. 34a), despite the fact that governing regulations and procedures require the ALJ to look fully into the issues and authorize him to gather new evidence or order a consultative examination prior to the hearing (Gov't Br. 9). It is true that under the district court's order, the ALJ is free to seek such additional evidence *after* the hearing (Resp. Br. 32). But it is not for the district court to dictate to an ALJ whether he will seek necessary evidence before or after a hearing. If the ALJ gathers all evidence in advance, it may turn out that the claimant will be found eligible for benefits without the need for a hearing (see J.A. 52). Even if that does not occur, full development of the case by the ALJ and his

staff prior to the hearing at least will serve to focus the issues and lead to more efficient and fair adjudications. Thus, just as a district court would not ordinarily schedule a case for trial before discovery has been completed, the Secretary's procedures permit an ALJ to complete necessary discovery prior to the hearing.[15]

3. Respondents' assertedly fact-bound submission also overlooks the fact that because Congress has conferred on the Secretary the responsibility for adopting rules and procedures for the adjudication of claims (42 U.S.C. (& Supp. V) 405(a) and 421(a); *Heckler* v. *Campbell*, No. 81-1983 (May 16, 1983), slip op. 7-8)), it is for the Secretary, not the courts, to give content in the first instance to the statutory phrase "reasonable * * * opportunity for a hearing." The validity of the overall manner in which the Secretary has accommodated the numerous and often competing statutory goals in implementing the hearing requirement does not turn on whether a court would take the same approach; whether the resulting administrative process, including the time typically required to adjudicate claims under it, satisfies a court's own view of what is most "reasonable"; or whether the Secretary

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[15] Respondents appear to suggest (Resp. Br. 25-26 n.25) that the provisions of the *OHA Handbook* providing for a prehearing workup and for the scheduling of the hearing after that workup is completed may violate 42 U.S.C. (Supp. V) 405(b) if those measures "prevent[] fulfillment of the need for expedition" (Resp. Br. 26 n.25). However, 42 U.S.C. (Supp. V) 405(b) simply provides for a "reasonable * * * opportunity for a hearing," of which timing is but one element. Surely, it is a "reasonable" feature of an adjudicatory process to complete discovery and other preparation prior to the hearing, even if the date of the hearing itself may sometimes be postponed as a result. This is consistent with the Social Security Board's understanding soon after 42 U.S.C. (Supp. V) 405(b) was enacted in 1939. The Board explained that "[t]here is * * * no requirement in the act that a hearing be accorded to a claimant * * * immediately upon his request. Reasonable preliminaries may be imposed. If the Board sees fit, it can require a consultation between the claimant and a representative of the Board prior to the hearing, for the purpose of clarifying the issues." S. Doc. 10, *supra* note 9, at 39. See also *id.* at 42.

is able to convince a court of the soundness of each step in the processing of each individual claim. The question, rather, is whether the Secretary's rules and procedures are arbitrary and capricious. *Heckler* v. *Campbell*, slip op. 7-8; *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 43-44 (1981); *Batterton* v. *Francis*, 432 U.S. 416, 424-426 (1977). Judicial deference to the manner in which the Secretary has implemented the statutory hearing requirement is particularly warranted in the present context, because the availability of resources has a substantial impact on the speed with which claims are decided, and because Congress itself determines each year the amount of money that should be made available from the Trust Funds for the administration of the disability program. 42 U.S.C. (Supp. V) 401(g)(1)(A) and 421(e).

This conclusion is reinforced by a consideration of the relative expertise of Congress and the Secretary on the one hand and the courts on the other to address the overall institutional problems presented in administering the vast Social Security disability program. Reducing the average time taken to adjudicate claims while maintaining or improving other aspects of the adjudicatory process presents complex questions of policy, resource allocation, management, relative equities of claimants, and the feasibility and desirability of revising various interrelated procedures. These matters are uniquely within the competence of Congress and the Secretary to resolve,[16] and in fact Congress amended the Act in 1980 to strengthen the Secretary's oversight of the States' administration of the Act, including questions of timing. 42 U.S.C. (& Supp. V) 421. See Gov't Br. 44-45. The courts, in contrast, generally are not well suited to address such questions of administrative efficiency on a mass scale, especially with nothing more to guide them

[16] The affidavit and reports of the Vermont DDA director and HHS officials regarding the administration of the disability program in Vermont (J.A. 161-191), upon which respondents rely (Resp. Br. 25 & n.24), demonstrate that these officials take their management and oversight responsibilities seriously.

than statutory language as vague as that in 42 U.S.C. (Supp. V) 405(b) providing for a "reasonable * * * opportunity for a hearing."[17] This has been the view of commentators who have studied the Social Security disability program.[18]

4. We have sufficiently answered in our opening brief respondents' contention (Resp. Br. 43-50) that the courts below properly ordered the payment of interim benefits to claimants whose cases are not decided within the judicially prescribed time limits. See Gov't Br. 46-49. When Congress has wished to depart from the general rule that disability benefits may be paid only upon a final decision that the claimant is disabled (42 U.S.C. (& Supp. V) 405(i) and 423(a)(1)), it has expressly so provided in the Act itself. Congress did so in 42 U.S.C. 405(q), which excludes disability claims altogether from its authorization of expedited benefits, and then in 1982 in Public Law No. 97-455, which provides for interim benefits pending an ALJ decision only in disability *cessation* cases. Contrary to respondents' contentions (Resp. Br. 46-48, 49), Congress's explicit provision for interim benefits pending administrative review in certain circumstances under Title II forecloses an award by the courts

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[17] See Goldman, *Administrative Delay and Judicial Relief*, 66 Mich. L. Rev. 1423, 1430 (1968). As explained by Professor Goldman, this is so for several reasons: (1) "the large number of potentially relevant factors and the difficulty of assessing the relative importance of each variable" (66 Mich. L. Rev. at 1429); (2) the likelihood of constant "relitigation of the same issue under changing circumstances," thereby consuming scarce judicial time (*id.* at 1430); (3) the "difficulty of acquiring enough evidence," given the limited factfinding resources of the judiciary (*ibid.*); and (4) the "serious question" about "the courts' ability to fashion an appropriate remedy" for administrative inefficiency (*ibid.*). In short, "[i]f delay results from inadequate appropriations, lack of personnel, or incompetence, the remedy seems to be with the legislature and not with the courts" (*ibid.*).

[18] See J. Mashaw, *Bureaucratic Justice* 185-190, 226 (1983); Book Review, *Bureaucratic Vision*, 96 Harv. L. Rev. 1952, 1958-1962 (1983); Note, *Judicial Resolution of Systemic Delays in Social Security Hearings*, 79 Colum. L. Rev. 959, 968-982 (1979).

in circumstances where Congress has refused to authorize interim benefits.

Respondents attempt to avoid this result by contending (Resp. Br. 43 n.46, 45 n.47, 48) that the payments involved are not really disability benefits, but rather are simply relief payments intended to compensate persons whose claims are not considered within the judicially imposed time limits and to secure compliance with those time limits. Respondents' assertion is somewhat disingenuous. The district court explicitly stated in its judgment that the payments it ordered were "interim Title II disability insurance payments to Title II disability claimants" (Pet. App. 34a) and termed the payments "benefits" (*id.* at 35a). But even if respondents' characterization were correct, the substantive limitations Congress placed on the payment of benefits cannot be avoided simply by use of labels or by incorporating the monetary relief in an equitable decree. See *Schweiker* v. *Hansen*, 450 U.S. 785, 788 (1981).[19]

In any event, the award of interim benefits is barred under the doctrine of sovereign immunity because Congress concededly has not affirmatively authorized such payments from the federal Treasury. U.S. Const. Art. I, § 9, Cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"). Respondents argue (Resp. Br. 48-49), however, that the fiscal consequences of compliance with a prospec-

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[19] Even where monetary relief is appropriate to enforce a decree, the plaintiff must prove his substantive entitlement in order to obtain compensation. *United States* v. *United Mine Workers*, 330 U.S. 258, 303-304 (1947). The courts in *Rodriguez* v. *Swank*, 496 F.2d 1110, 1111 (7th Cir.), cert. denied, 419 U.S. 885 (1974), and *Alexander* v. *Hill*, 707 F.2d 780, 782-783 (4th Cir. 1983), petition for cert. pending, No. 83-163, relied upon by respondents (Resp. Br. 45 n.47), awarded monetary relief only to persons found eligible for benefits. The interim benefits involved here are not based on a finding of disability. In *Smith* v. *Miller*, 665 F.2d 172, 174 (7th Cir. 1981), also cited by respondents (Resp. Br. 45 n.47), the federal program manual required participating states to provide that applications would be automatically approved if not acted upon within a specified period.

tive injunctive decree entered against a federal official are merely an "ancillary" and "inevitable" effect of the decree and therefore are permissible under the doctrine of sovereign immunity. This transparent attempt to avoid the bar of sovereign immunity should not be countenanced.

The courts below did not find, and respondents do not contend, that the Social Security Act itself requires the payment of interim benefits where the Secretary does not conduct a hearing within a fixed or "reasonable" period of time. As respondents concede (Resp. Br. 45, 48-49), the interim payment relief was fashioned entirely by the court, assertedly under its "equitable" powers, without regard to the terms of the Social Security Act. Thus, respondents do not seek the future payment of interim benefits pursuant to the Social Security Act, such that a judicial order requiring the Secretary to comply with the Act in the future carries with it the incidental, inevitable consequence of requiring the payment of benefits if the deadlines are not met. Rather, respondents in effect ask this Court to recognize an implied right of action under the Social Security Act for money damages to be paid out of the Treasury as a remedy when the Secretary has violated the Act's hearing requirement. Compare *Carey* v. *Piphus*, 435 U.S. 247 (1978). As this Court has made clear, an award of money damages against the government as a remedy for violation of a statute is barred by sovereign immunity unless Congress has affirmatively waived that immunity. *United States* v. *Mitchell*, No. 81-1748 (June 27, 1983), slip op. 6; *United States* v. *Testan*, 424 U.S. 392, 399-403 (1976). Congress has not done so here.

For the foregoing reasons and the additional reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

MARGARET M. HECKLER,
SECRETARY OF THE DEPARTMENT OF
HEALTH AND HUMAN SERVICES

Petitioner,

v.

LEON S. DAY, et al.

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF AMICI CURIAE OF THE ALLIANCE OF SOCIAL SECURITY DISABILITY RECIPIENTS, THE GRAY PANTHERS, THE OLDER WOMEN'S LEAGUE, THE LUPUS FOUNDATION OF AMERICA, AND THE AMERICAN ASSOCIATION OF UNIVERSITY WOMEN IN SUPPORT OF APPELLEES' POSITION

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TABLE OF CONTENTS

Page

BRIEF AMICI CURIAE 1

INTERESTS OF THE AMICI CURIAE. . . 1

SUMMARY OF ARGUMENT. 5

ARGUMENT:

I. Without disability benefits, the disabled are without the economic, physical and emotional wherewithal to escape "the very margin of subsistence." Administrative delays in obtaining or restoring benefits significantly exacerbate their difficulties. 8

II. The federal courts, the Congress, and the press have examined the Secretary's policies and found them to be harsh, unfair, and, in many cases, illegal. 28

III. The district court's exercise of its equitable power in fashioning the relief was appropriate, necessary, and is consistent with the Congress' own actions in addressing the severe consequences of SSA's administrative delays. 48

CONCLUSION. 56

TABLE OF AUTHORITIES

Cases: Page

Chagnon v. Schweiker,
560 F.Supp. 71 (D.Vt. 1982) . . 18,19

Chee v. Schweiker,
No. Civ.-82-693-PCT-VAC
(D.Ariz. 1982) 39

Day v. Weinberger,
522 F.2d 1154 (9th Cir.
1975) 39

Finnegan v. Mathews,
641 F.2d 1340 (9th Cir.
1981) 39,40

Goldberg v. Kelly,
397 U.S. 254 (1970) 11

Griffis v. Weinberger,
509 F.2d 837 (9th Cir.
1975) 39

Kuzmin v. Heckler,
No. 82-5705 (3d Cir.
August 18, 1983) 40

Lopez v. Heckler,
No. 83-0697-WPG[T]
(C.D.Cal. June 16, 1983),
appeal pending 9th Cir., stay
granted on one portion of the
district court's order, No.
A-145 (Justice Rehnquist,
September 9, 1983) 39

Mathews v. Eldridge,
424 U.S. 319 (1975) 11,46,47

Miranda v. Secretary of Health,
Education and Welfare,
514 F.2d 996 (1st Cir. 1975) . 40

Page

Mental Health Association of Minnesota v. Schweiker, 554 F.Supp. 157 (D.Minn. 1982), appeal pending 8th Circuit. 36,37,38

Morrison v. Heckler, Civil Action No. C 82-888V (W.D.Wash. 1983) 39

Nelson v. Heckler, CCH Unempl. Ins. Rptr. ¶14,684 (8th Cir. July 26, 1983). 39,40

Patti v. Schweiker, 669 F.2d 582 (9th Cir. 1982). 39,40

Rhodes v. Schweiker, 660 F.2d 722 (9th Cir. 1981). 39

Sharpe v. Harris, 621 F.2d 530 (2d Cir. 1980). 19

Siedlecki v. Schweiker, Civil Action No. 82-61R (W.D.Wash. 1983) 38,39

State of New York v. Heckler, 83 Civ. 5903 (S.D.N.Y. filed August 10, 1983) . . . 38

Trujillo v. Heckler, Civil Action No. 82-K-1505 (D.Colo. August 16, 1983). . 40

Statutes

5 U.S.C. §553. 35,37

42 U.S.C. §402(s)(1) 13

42 U.S.C. §403(a)(6) 13

42 U.S.C. §405(b). 5,6,47

	Page
42 U.S.C. §405(g)	9
42 U.S.C. §405(q)(5)	50
42 U.S.C. §421(h)(1)	28
42 U.S.C. §423(g)	7,50
42 U.S.C. §424a	15
42 U.S.C. §424a(2)(B)	16
42 U.S.C. §424a(6)	16
42 U.S.C. §1382b(a)(1)	20
42 U.S.C. §1382c(a)(3)	18
§311(a), P.L. 96-265	28
§311(b), P.L. 96-265	28
§2208(a)(2) to (4), P.L. 97-35	15
§2, P.L. 97-455	7,10,49,50

Regulations

20 C.F.R. §404.900(a)	8
20 C.F.R. §404.909(a)(1)	9
20 C.F.R. §404.933(a)(1)	9
20 C.F.R. §404.968(a)(1)	9

Legislative history : hearings

"Administration's Fiscal Year 1983 Legislative Proposals for Unemployed Compensation and Public Assistance," Hearings before the Subcommittee on Public Assistance and Unemployment Compensation of the Committee on Ways and Means, Serial 97-62 (March 25, April 21 and 22, 1982)	30,31

Page

"Disability Amendments of 1982," Hearings before the Subcommittee on Social Security of the Committee on Ways and Means on H.R. 5700, Serial 97-54, (March 16 and 17, 1982) 30,35

Hearing on Disability Issues in the Supplemental Security Income program, Subcommittee on Public Assistance and Unemployment Compensation, Committee on Ways and Means, U.S. House of Representatives (August 3, 1983) 32

Hearing on the Problems in the Social Security Disability Program, Social Security Subcommittee, Ways and Means Committee, U.S. House of Representatives (June 30, 1983) 31

Hearing on Problems in the Social Security Review Process, Hearing before the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs, United States Senate (June 1983) 31

"Oversight of Social Security Disability Benefits Terminations," Hearing before the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs, United States Senate (May 25, 1982) 31,38

"Possible Irregularities in Medical Examinations Purchased from 'Volume Providers' for the Social Security Disability Program," Hearing before the Subcommittees on Social Security and Oversight of the Committee on Ways and Means, Serial 97-55 (March 11, 1982) 30,36

"Social Security Appeals and Case Review Process," Hearings before the Subcommittee

Page

on Social Security of the Committee on Ways and Means, Serial 97-31 (October 23 and 28, 1981) 30

"Social Security Disability Insurance Program Cessations and Denials," Select Committee on Aging, Committee Print 344 (May 1982); and "Impact of Accelerated Reviews on Terminations and Denials," Committee Print 345 (May 1982) 31,38

"Social Security Disability Review: A Federally-Created State Problem," Select Committee on Aging, U.S. House of Representatives [hearing in Washington, D.C. June 1983; four field hearings, 1983]. 31

"Social Security for Mentally Disabled," Hearing before the Special Committee on Aging, United States Senate (May 1983) 31,35

Legislative history : floor statements

Senator Boren, Congressional Record, December 3, 1982, p. S 13855-6. . 51,52

Senator Brooke, Congressional Record, October 1, 1976, p. 34549 20

Senator Byrd, Congressional Record, December 3, 1982, p. S 13867 . . 54

Senator Clark, Congressional Record, October 1, 1976, p. S 34546 . . 20

Senator Cohen, Congressional Record, December 3, 1982, p. S 13856 . . 52

Senator Heinz, Congressional Record, December 3, 1982, p. 13857 . . . 52,53

Congressional Record, April 26, 1983, p. S 5215. 26

Page

Senator Levin, Congressional Record, December 11, 1981, pp. S 15103-4 . . 17,18, 25,26, 54,55

Congressional Record, December 3, 1982, p. S 13861. 28

Senator Metzenbaum, Congressional Record, December 3, 1982, p. S 13853 24,51

Senator Pryor, Congressional Record, December 3, 1982, p. S 13862 53,54

Senator Sasser, Congressional Record June 22, 1982, p. S 7289 17,26

Legislation : pending

H.R. 2987. 49

H.R. 3755 . . . . . 32,49, 50

S. 476 49

Miscellaneous

"Annual Statistical Supplement, 1981," Social Security Bulletin 3,12,13, 14

Characteristics of General Assistance in the United States, Department of Health, Education and Welfare (1978) . . . 16

"Key Workload Indicators, FY 1983," Social Security Administration (May 1983). 10,33

Lando, Farley and Brown, "Recent Trends in the Social Security Disability Insurance Program," Social Security Bulletin, Vol. 45, No. 8 (August 1982) 33

Page

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"News from Bill Armstrong, U.S. Senator for Colorado," September 28, 1982. 10,11,47

Opening Statement of Representative Pickle at the Hearing on Social Security Disability Insurance Program before the Social Security Subcommittee of the Ways and Means Committee (June 30, 1983) 32

"Passing the Buck: Federal Efforts to Abandon the Mentally Disabled," A Report by the Office of the City Council President, New York City (1982) 38

"SSA Needs to Protect Against Possible Conflicts of Interest in Its Disability Programs," GAO/HRD-83-65 (June 10, 1983). 36

"Statement of Margaret M. Heckler, Secretary of Health and Human Services," HHS News Release (June 7, 1983) 46

Statement of Paul B. Simmons, Deputy Commissioner of Social Security, Oversight Hearing on Social Security Disability Insurance Program, Select Committee on Aging, U.S. House of Representatives (June 20, 1983). 29

Statement of Peter J.McGough, Office of Program Planning, General Accounting Office, before the Senate Special Committee on Aging, April 7, 1983,

Page

reprinted in the Congressional Record, pp S 5216-5220 (April 26, 1983) . . . 41,42

Testimony of Floyd A. Davis, M.D., Director, Multiple Sclerosis Center, Rush-Presbyterian-St. Luke's Medical Center, on behalf of the National Multiple Sclerosis Society before the Social Security Subcommittee of the Ways and Means Committee (June 30, 1983) 38

Miscellaneous : Articles and Editorials

"Benefits OK'd a Week After He Died," Philadelphia Daily News (December 10, 1982) 24

"Bill Promised to Curb Disability Cutoff Abuses," Los Angeles Times (September 19, 1982) 44

"Congress Considers Revising Review Procedures for Disability Payments to Aid the Beneficiaries," Wall Street Journal (August 18, 1982) . . 43

"Crackdown on disability aid, 'a disgrace,'" The Sunday Herald (January 2, 1983) 21,22

"Cut, Cut... Think, Think," Los Angeles Times (March 25, 1982) . . . 45

"Cuts in U.S. Aid to Disabled Lead to 'Horror Stories,' Panel Told," Los Angeles Times (April 9, 1982). . 43

"Disability Purge Ruinous to Many," Los Angeles Times (March 21, 1982) . 43

"Disability: Question of benefit eligibility leaves thousands in limbo," The Sunday Gazette-Mail

Page

(August 29, 1982) 43,44

"Disability review changes: 'By no means a solution,'" Philadelphia Inquirer (June 9, 1983) 45

"Disabled: What Happens When Uncle Sam Says You're OK?" Akron Beacon Journal (July 11, 1982) 24,43

"11 Denied Social Security Disability Die of Illnesses," Los Angeles Times (September 17, 1982) 24,25

"Fairness of Reagan's Cutoffs of Disability Aid Questioned," New York Times (May 9, 1982). 43

"He lost his disability pay; then lost his ability to live; Cutoff of man's benefits linked to suicide," Los Angeles Herald Examiner (December 31, 1982) 26

"In the New Rush for Budget Savings, a Life is Trampled," Washington Post (May 27, 1982) 44

"Many in need losing Social Security disability benefits," The Day (January 2, 1983) 44

"Not Fair Enough for the Disabled," New York Times (June 14, 1983). . . . 45

"Pension Unit Issues Policy on Suicides: Social Security Rules Stress Care on Threats Made by People Denied Benefits," New York Times (May 8, 1983) 27

"Plight of the Disabled," Los Angeles Times (June 9, 1983). 45

"Poor, disabled suffer budget-cut hardship," News-Press (October 26, 1982) 44

Page

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"Protect rights of disabled," Philadelphia Inquirer (June 7, 1983) 45

"'Purge' of Disabled from Benefit Rolls Alleged at Hearing," Daily Journal, (April 9, 1982) 43

"Purging of Disability Rolls Multipies Financial Worries," Commerical Appeal (May 31, 1982) 22,23

"Questioning disability decisions," The Boston Globe (October 14, 1982) . . . 45

"Safety Net Shrinks," Commercial Appeal (June 5, 1982) 45

"Shame! Death by regulation and other Social Security tragedies," The Boston Phoenix (January 26, 1982) . . 43

"Social Security: A Systematic Breakdown; Social Security's a Little Short on Heart, Too," Philadelphia Daily News (February 16, 1983) 44

"Social Security Cutbacks Border on Terrorization," Southwest Times Record (November 14, 1982) 44

"Social Security cutoffs criticized: Citing disabled, GAO faults wholesale terminations," Philadelphia Inquirer (December 14, 1982) 44

"Social Security Told to Restore Mentally Ill Benefits: Judge Rules Cutoff Standards Faulty in Midwest," Washington Post (December 24, 1982) . . . 44

Page

"Survival: The System v. Walter Davis," Philadelphia Daily News (November 11, 1982) 44

"Taking up cause of the disabled," Seattle Post-Intelligencer (June 28, 1982) 45

"The Disability Nightmare," Newsday (March 21, 1983) 44

"Through the Safety Net," Philadelphia Inquirer (March 21, 1982) 43

"Wheelchair-bound: Appeal drags on for disabled woman whose checks where cut off," Richmond News Leader (October 18, 1982) 44

"Wielding ax is no way to trim disability rolls," Philadelphia Inquirer (September 18, 1982) 45

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"U.S. 'stress test' adds to trouble of heart patients," St. Petersburg Times (July 10, 1983) 44

No. 82-1371

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

MARGARET M. HECKLER,
SECRETARY OF THE DEPARTMENT OF
HEALTH AND HUMAN SERVICES,

Petitioner,

v.

LEON S. DAY, et al.,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF AMICI CURIAE

INTERESTS OF AMICI ORGANIZATIONS

Pursuant to Supreme Court Rule 36, counsel for the petitioner and the respondents have consented to the filing of this brief amici curiae. Their letters of consent have been filed with the Clerk of the Court.

The Alliance of Social Security Disability Recipients is an organization founded to serve disability applicants and recipients. The Alliance was formed by disability recipients, their family members and concerned citizens in response to the harsh, unfair, and illegal denials and terminations of disabled Americans by the Social Security Administration (SSA). Five members of the Alliance have died after SSA denied or terminated their benefits. The Alliance is aware of at least twelve more deaths and great suffering in thousands of individuals' lives as a result of SSA's actions. At this time, the Alliance has approximately 3,000 members in eighteen states.

The Gray Panthers is a national organization comprised of approximately 40,000 individuals who reside throughout the United States. "Dedicated to helping the Nation's elderly," Schweiker v.

Gray Panthers, 453 U.S. 34, 40 (1981), its members seek to reform and improve various laws and institutions which affect the lives of the nation's elderly, many of whom are disabled.

The Older Women's League is the first grass-roots membership organization to focus exclusively on the concerns of mid-life and older women. The Older Women's League (OWL) works for policy changes to reduce the inequities faced by older women. Founded following the White House Mini-Conference on Older Women, OWL has 7,000 members nationwide and chapters in thirty states. Over 900,000 women receive Social Security disability benefits as disabled workers. 75% of these women are between ages 50-64.*

The Lupus Foundation of America

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*"Annual Statistical Supplement," Social Security Bulletin (1981).

is a private non-profit organization comprised of over 22,000 members. The Foundation was created in order to improve the standard of care and treatment of those individuals who suffer from lupus erythematosus. Lupus erythematosus is a disease of the immune system that often affects the kidney, brain, lungs, joints, and/or skin. One of the major goals of the Lupus Foundation of America is to work for the provision of programs and services that will directly improve the quality of life of all those who have the disease.

The American Association of University Women (AAUW) is an organization of 194,000 college-educated women which was formed over one hundred years ago to open the doors of education and broaden the opportunities available to women. Obstacles still exist that prevent women, minorities and the handicapped from obtaining a complete education

and gainful employment - a fact made apparent by the poverty statistics that put these groups at the bottom of the economic ladder. AAUW is therefore keenly aware of the additional hardships forced upon these segments of our population by unfair and unreasonable requirements made of applicants and recipients of the Social Security Disability Insurance program by SSA.

SUMMARY OF ARGUMENT

Section 205(b) of the Social Security Act, 42 U.S.C. §405(b), requires that the Secretary provide "reasonable notice and an opportunity for a hearing" when an appeal from a denial or termination of benefits is filed. It is amici's position that in order to properly assess what is a "reasonable" time frame for administratively processing Social Security disability appeals, the Court must focus both on who the appellants are and the effects of delay in their lives as well

as the interests of the administrative agency. These same factors must be considered in assessing the appropriateness of the remedy provided by the district court. This brief provides the Court with the human data needed to fully evaluate the merits of this case.

It is the purpose of this brief to make the following three points:

1. In the context of assessing what is a "reasonable" time for processing administrative appeals in the Social Security disability insurance ("DI") program, 42 U.S.C. §405(b), this Court must focus upon the extreme physical, emotional and financial hardships which delays in the administrative appeals process are creating in the lives of the disabled appellants.

2. The reliability and accuracy of the Secretary's decisions have decreased dramatically in recent years. This decrease in quality has exacerbated

the problems with administrative delays already existing in the appeals process. Contrary to the Secretary's representations to this Court, the delays are not "such an entrenched feature - and direct and foreseeable consequence - of the conscientious implementation of the Social Security Act by Congress and the Secretary," that it would be "inconceivable" that they "could be found to violate that very Act." (App. Br. p. 33; see also p. 16).

3. Finally, amici take issue with the Secretary's statement that Congress never approved of interim benefits in the DI program "based solely on the passage of time." (App. Br. p. 18) "Passage of time" and the havoc it wreaks with the disabled worker's life is precisely the problem which the Congress sought to address in Section 2, P.L. 97-455; 42 U.S.C. §423(g).

I. Without disability benefits, the disabled are without the economic, physical and emotional wherewithal to escape "the very margin of subsistence." Administrative delays in obtaining or restoring benefits significantly exacerbate their difficulties.

Contrary to the appellant's representations, amici believe that the administrative appeals procedures are not "prescribed in meticulous detail" [App. Br. p. 2], nor "carefully considered and pervasively regulated" [App. Br. p.14]. It is a system which appears to be completed regulated. Instead the procedures regulate only the entry of the claimant into the process and place time restraints upon the claimant's appeal of his claim.[1/] Nothing in the

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[1/] In the Title II program, there are five levels of review: initial decision, reconsideration, administrative law judge, Appeals Council, federal court. See 20 C.F.R. §404.900(a). At each level of review, the claimant or beneficiary who disagrees with SSA's decision must appeal to the next level of review with-

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current scheme addresses or attempts to consider the severe economic and emotional needs of the appellant whose case becomes stranded in the administrative process for several months, often well over a year. Similarly, the Secretary's brief fails to address these needs.

The delays faced by disabled individuals appealing a denial of an application or a decision to terminate benefits vary significantly. While only 33.2% of the appeals were disposed of within 120 days (four months), over 5%

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in sixty (60) days of the agency's last decision. See 20 C.F.R. §§404.909(a)(1) [request for reconsideration must be filed within 60 days of receipt of initial determination]; 404.933(a)(1) [request for hearing before ALJ must be filed within 60 days of receipt of ALJ decision]; 404.968(a)(1) [request for Appeals Council review must be filed within 60 days of receipt of ALJ decision]; 42 U.S.C. §405(g) [complaint for judicial review must be filed within 60 days of Secretary's final decision]. These are the only time frames imposed in the administrative appeals process. The Secretary imposes none on herself.

did not receive decisions until later than 345 days (over eleven months). At least 25% waited longer than 210 days for a decision.[2/]

Senator William Armstrong, chair of the Social Security Subcommittee of the Finance Committee, has described the continuation of benefits[3/] during appeal as "a life preserver" to disability recipients "cut off from federal aid -- their true lifeline -- and left to drift while they appeal the decision..."[4/] Citing a 60% reversal rate at the ALJ level on CDI termination cases, Armstrong further stated, "Clearly, many in need are being

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[2/] "Key Workload Indicators, FY '83," (May 1983), page 6.

[3/] P.L. 97-455, Section 2, discussed at pages 42-48, infra.

[4/] "News from Bill Armstrong, U.S. Senator from Colorado," September 28, 1982.

wrongly bumped from the rolls. Continuing benefits during appeal will go a long way toward halting unfair disruptions in the lives of our disabled."[5/]

In Mathews v. Eldridge, 424 U.S. 319 (1975), this Court distinguished the circumstances of welfare recipients in Goldberg v. Kelly, 397 U.S. 254 (1970), from those of a DI recipient stating that "welfare assistance is given to persons on the very margin of subsistence." 424 U.S. at 340. While "the hardship imposed upon the erroneously terminated disability recipient may be significant," this Court believed that "the disabled worker's need is likely to be less than that of a welfare recipient." Id. at 342. Unfortunately, when put to the test in recent years, these distinctions have not been borne out. Whatever differences may exist initially for some

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[5/] Id.

fade quickly as the disabled appellant becomes stranded in the SSA bureaucracy.

In 1981, the average monthly benefit amount paid to disabled men was $454.20 while women received an average benefit of $328.40.[6] In that same year, the federal poverty level for an individual was $4,360.[7] While the average annual benefit for disabled men exceeded this figure ($5,450), the average annual benefit for disabled women was below the poverty level. ($3,940).

Loss of benefits affects not only the disabled worker but also his or her family. In 1981, 1,070,000 children under the age of 18 were receiving DI benefits on their disabled parents' accounts.[8] 32,664 disabled children over age 18 were

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[6] "Annual Statistical Supplement, 1981," Social Security Bulletin, Table 95.

[7] Id., page 2.

[8] Id., Table 100.

dependent on their disabled parents' benefits.[9] Further, 428,212 spouses of disabled workers received benefits in 1981. Of those, 351,820 were entitled to benefits due to the presence of children under age 18 or of a disabled child over age 18.[10] 74,403 received benefits because they were over age 62.[11]

In 1979, the average age of disabled workers in current-pay status was

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[9] Id.

[10] Effective August 1, 1981, the mother is only eligible so long as the child is younger than 16. 42 U.S.C. §402(s)(1). Public Law 97-35. "Annual Statistical Supplement, 1981," Social Security Bulletin, Table 98.

[11] Id. The benefits available to a disabled worker and his or her family are limited to the smaller of "(A) 85 percent of such individual's average indexed monthly earnings (or 100 percent of his primary insurance amount, if larger), or (B) 150 percent of such individual's primary insurance amount." 42 U.S.C. §403(a)(6). As a result of this ceiling on the amount of benefits, a disabled wage earner with a family receives only slightly more than an individual disabled worker would receive.

52.9 years for men and 53.7 years for women.[12] 57% of the men and 60.4% of the women receiving DI benefits were between the ages of 55 through 64 years.[13]

While there may be some DI beneficiaries who receive income from other sources, most DI recipients do not. An analysis reported in 1980 based upon a special study of the disabled in 1972 found that 56.1% of the disabled received no income other than DI.[14] Of the remainder who did receive another benefit, 21% received Veterans' benefits; 8.9% private employer pension;[15] 6.4%

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[12] Id., Table 97.

[13] Id.

[14] Muller, "Receipt of Multiple Benefits by Disabled Worker Beneficiaries," Social Security Bulletin, Vol. 43, No. 11, pp. 3-19 (November 1980).

[15] As many private pension plans base eligibility for their disability benefits upon receipt of Social Security DI benefits, termination of DI benefits often results in loss of this second source of income as well.

disabled welfare benefits (pre-SSI); 3.8% government pension; 3.5% workers' compensation; 2.7% other public assistance; 2.0% private insurance; 1.2% Aid to Families with Dependent Children; .4% Railroad Retirement; and .4% temporary disability insurance.[16/] However, even these figures, if applied to 1983, exaggerate the income available to the minority of DI recipients who are fortunate enough to receive other benefits. In 1981, the Congress enacted §2208(a)(2) to (4) of P.L. 97-35, 42 U.S.C. §424a, which imposed a "cap" on the amount of benefits which a DI recipient could receive from almost any source.[17/] As a

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[16/] Muller, see fn. 14, supra, Table 9.

[17/] 42 U.S.C. §424a was expanded to provide for offset of not only workers' compensation against the DI benefit, but also offset of other disability benefits provided by federal, state and local governments. The offset does not

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result, a DI recipient who has additional benefit sources cannot receive more than 80% of their previous average current earnings. 42 U.S.C. §424a(6).

Many states do not have general relief programs.[18] As a result, a person terminated from DI will often not

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apply to Veterans' benefits, "benefits payable under a program of assistance which is based on need" and "benefits under a law or plan of the United States based on service all or part of which is employment" as defined under the Social Security Act. 42 U.S.C. §424a(2)(B). The result of the offset is to limit further the benefits available to the disabled worker and his/her family. The offset applies to the extent that the total benefits available to the worker and his family exceed 80% of his prior average current earnings. 42 U.S.C. §424a(6).

[18] Based upon the most recent data available from HHS, 32 of 54 jurisdictions (including Guam, Virgin Islands, and the Northern Marianas), provided no or very limited general assistance in specified situations. Characteristics of General Assistance in the United States, Department of Health, Education and Welfare (1978) at 134.

have any source of income.[19] Senator Carl Levin described the plight of a disabled beneficiary residing in Alabama, which does not provide general assistance:

> One such person is the 58-year-old woman from Phoenix City, Ala., with 40 years of work experience

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[19] In addition to loss of income, if the DI recipient has been eligible to receive DI for at least two years, he/she also receives Medicare benefits. Loss of health coverage for those who are, by definition, ill, raises serious problems. First, it is often impossible to obtain needed medical care without payment if the Medicare card is no longer available. Second, "In many instances, Medicare eligibility is absolutely essential as it is nearly impossible for disability recipients to receive adequate medical insurance because of high premiums or outright refusal by the insurance carrier." Statement of Senator Sasser, Congressional Record, p. S 7289 (June 22, 1982) Third, retroactive reinstatement of coverage when an appeal is won is wholly unsatisfactory. It is impossible in December to provide the health care that was needed in March. In all likelihood, where medical care could not be obtained, the person's condition will have deteriorated by the time of restoration of benefits. Finally, even those states which provide some form of general relief often do not provide a medical assistance program for non-Medicaid eligible individuals.

> as a presser and a domestic... Two years ago, she was placed on disability because of controlled hypertension - despite heavy medication - arthritis, heart complications, obesity, and severe asthma. [Her benefits were terminated. She appealed and won.] However, this severely disabled woman has gone 9 months without benefits. To date, restored benefits have not been received. She has lived on a $130 a month VA pension which she receives as a result of her husband's death. There is no general assistance program in Alabama. She is too young for SSI for the aged and has no young offspring living with her - therefore, she cannot qualify for AFDC. Her struggle to survive during such economic strife has only seemed to worsen her condition..."
>
> Statement of Senator Levin, Congressional Record, p. S 15103-4 (December 11, 1981)

SSI benefits will not be available because that program includes the same definition of disability as the DI program. See 42 U.S.C. §1382c(a)(3). And, even where welfare benefits may be available, courts have recognized that the disabled beneficiary remains in dire straights. See Chagnon v. Schweiker,

560 F.Supp. 71,74 (D.Vt. 1982) [The court held that the record supported plaintiffs' position that "claimants forced to undergo lengthy delays often suffer severe hardship" while trying to survive on general relief, food stamps and the charity of friends.][20/]

There is little information which assesses what resources, aside from income, might be available to the disabled individual whose benefits are denied or terminated and must withstand many months without his or her disability benefits. However, as the average DI benefits are very modest, it is reasonable to expect that the average disabled worker will have, at most, a home, with mortgage, and an automobile.

20/ This Court should note that the delays do not end when the claimant or beneficiary finally receives a favorable decision. The plaintiffs in Chagnon sought relief from excessive delays in SSA's implementation of favorable decisions. See also, Sharpe v. Harris, 621 F.2d 530, 531-2 (2d Cir. 1980).

Often the resources which the disabled person is forced to sell or relinquish, once benefits are terminated or denied and delay ensues would not even be considered in determining if he/she would meet the resource test in the SSI program. For example, 42 U.S.C. §1382b (a)(1) excludes the full value of a person's home for SSI purposes.[21/]

[21/] The Congressional intent in enacting a total exclusion of the home was very clear: elderly and disabled people who have homes should not be forced out of their homes in order to receive SSI benefits. See Statement of Senator Clark ["I believe that we should try to encourage aged, blind and disabled persons to retain their homes. Most of these people worked long and hard for the homes they now enjoy. In practically all cases the home is their only major asset. They should not be forced to transfer it - after a lifetime of savings and work - in order to receive SSI. Congressional Record, p. 34546 (October 1, 1976)]; Senator Brooke ["To make a potentially eligible person ineligible for needed assistance because they have a nice home is truly unwarranted. To make them sell or move out of that home in order to be eligible is equally cruel and unjust..." Congressional Record, p. 34549 (October 1, 1976)]

Therefore, in assessing the financial need of disabled individuals faced with delays in obtaining appeal decisions, it is not appropriate to add in, as if they can or should be easily liquidated, the value of basic resources, such as the person's home.

Unfortunately, average benefit statistics do not sufficiently convey the human consequences when benefits are lost and excessive delays precede their restoration. In recent years, the press has repeatedly recounted the costs to the disabled of erroneous decision-making followed by delays in the appeals process.[22/] Two examples demonstrate the problems:

> "Olga Roy underwent 30 operations in the 1970s. Surgeons operated on her heart, back and intestines, removed a kidney and a cancerous pancreas.

22/ See citations for fn. 53, infra.

"The health problems forced the 49-year-old Mount Prospect woman to quit jobs as a school bus driver, butcher and waitress. Social Security declared her disabled in 1977 and she lived for a time on a $297 monthly government check.

"But in June 1981, the government ruled her ineligible for disability benefits and told her to get a job.

"Roy sold her funiture, moved in with relatives and appealed the decision. This September, after Roy had gone 15 months without disability benefits, a judge declared her disabled after all.

...'I sold my car and every piece of furniture I owned,' Roy said. She left her rented apartment and moved in with her family. 'I became a nomad. I had to go wherever someone could take me.'"23/

* * *

[Robert Wilson, a fifty-four year old former truck driver had undergone open heart surgery twice since he applied for DI benefits and was denied. He had been waiting 16 months when the following was written:]

"Last week the bank repossessed Wilson's truck and

23/ Doyle, "Crackdown on disability aid, 'a disgrace,' The Sunday Herald (Illinois), page 1, 9 (January 2, 1983).

> the power company shut off the gas to heat the family's suburban brick home.
>
> "'We have borrowed from family, friends, anyone we could,' said Helen Wilson. 'Right now, we owe about $15,000.' She said the couple's charge cards are at their limit.
>
> "'The only thing we can hope to do is try to sell the house and pay back all the people what we owe,' said Wilson, who drove 18-wheel trucks for 31 years."24/

While severe economic loss and destitution alone should establish the DI appellants' interest in timely hearings, available information shows other severe harms: the physical and mental condition of DI recipients whose benefits are terminated deteriorate while they wait out the lengthy appeal process. Some die from their impairments. Others kill themselves. For example, Senator Metzenbaum

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24/ Downing, "Purging of Disability Rolls Multiplies Financial Worries," Commercial Appeal, May 31, 1982.

reported his office's knowledge of thirty-two deaths of disabled individuals due to their disabling conditions after the Secretary had terminated benefits:

> "The situation has reached a crisis point. My staff has documented at least 32 deaths of persons who were told by SSA that their benefits were being terminated because they were no longer disabled and who then died shortly thereafter of their disabling condition." Congressional Record, p. S 13853 (September 3, 1982)25/

In September 1982, the Los Angeles Times reported on eleven deaths:26/

> "All but one of the 11 people who died had filed appeals seeking reinstatement of benefits... Thomas A. Alvey,

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25/See also, "Benefits OK'd a Week After He Died," Philadelphia Daily News, page 6 (December 10, 1982); "Disabled: What Happens When Uncle Sam Says You're OK?" Akron Beacon Journal, page D1 (July 11, 1982).

26/"11 Denied Social Security Disability Die of Illnesses," Los Angeles Times, page 1 (September 17, 1982).

> 47, of La Habra (Calif.]: He died August 16 of heart disease six months after he had been declared fit for work and no longer eligible for disability benefits. After his benefits were cut off, the former supermarket manager was forced to subsist on a $81.67 monthly stipend and help from his mother, whose only income was from Social Security."

Still others have found the stress of the long period without benefits to be too overwhelming and have committed suicide. For example:

> "Unfortunately, this bill comes too late for Evelyn Mattson of Arizona, a 60-year-old woman with a seventh grade education who had worked up until 1978 as an assembler, packer and inspector in a plastic factory. Ms. Mattson took her life 2 days before an appeal reversal decision [arrived] in the mail. In her suicide note addressed to her daughter she wrote:
>
> 'I never wanted to get old and not be able to care for myself and I can see it coming. I'm sure now I won't get my disability...'"

Statement of Senator Levin, Congressional Record, pp. S 15103-4 (December 11, 1981).[27]

The Social Security Administration has recognized that suicides have become a major problem in the program. It has developed policy guidelines instructing staff in the steps to take when an applicant or beneficiary threatens to

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[27] See also, "He lost his disability pay, then lost his ability to live: Cutoff of man's benefits linked to suicide," Los Angeles Herald Examiner, pp. A-3, 16 (December 31, 1982) [benefits terminated September 1981; disabled appellant committed suicide, April 1982; ALJ reversed termination, September 1982]; Statement of Senator Sasser, Congressional Record, p. S 7289, (June 22, 1982), reporting on the suicide of a constituent terminated from the DI rolls; Statement of Senator Heinz, Congressional Record, p. S 5215 (April 26, 1983) ["...the CDI reviews are literally pushing people to the brink of death, through despair and suicide. These are not people who suffer from mild mental problems. They are chronically mentally ill people who would be in public mental institutions if the times were different."]

commit suicide.[28/]

In sum, the costs to the disabled individual of delay in the appeals process are overwhelming: loss of income and severe emotional stress, often having a negative impact upon the person's physical and mental impairments. It is from the perspective of the disabled worker faced with lengthy delays that the Court should also consider how fallable the current decision-making structure is in the DI program.

28/ "Pension Unit Issues Policy on Suicides: Social Security Rules Stress Care on Threats Made by People Denied Benefits," New York Times, page 19 (May 8, 1983).

II. The federal courts, the Congress, and the press have examined the Secretary's policies and found them to be harsh, unfair, and in many cases, illegal.

In 1980, the Congress passed legislation requiring the Secretary to review the cases of DI beneficiaries once very three years if they are not determined to have a "permanent" disability. §311(a), P.L. 96-265; 42 U.S.C. §421(h)(1). The statute mandated the reviews to begin on January 1, 1982. §311(b), P.L. 96-265.

The Secretary did not wait until that date. Instead, the "continuing disability investigations" ("CDIs") were accelerated and began in March 1981. "Even normally dry statistics on what has happened speak with rare clarity and passion."[29/] SSA performed 180,000 CDI reviews in the remainder of FY 1981,

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29/ Statement of Senator Levin, Congressional Record, p. S 13861 (December 3, 1982).

497,000 in FY 1982, and had performed 337,000 in FY 1983, as of May 1983.[30] During that period 374,000 disabled beneficiaries were terminated from the program.[31] Hundreds of thousands more await CDI review in the next eighteen months and face similar termination prospects. With the increased number of terminations will come increasingly high numbers of appeals. The disabled therefore also face the prospect of even greater delays at the ALJ level of appeal.[32]

30/ Statement of Paul B. Simmons, Deputy Commissioner of Social Security, Oversight Hearing on Social Security Disability Insurance Program, Select Committee on Aging, U.S. House of Representatives, page 4 (June 20, 1983).

31/ Id.

32/ There were 320,000 requests for ALJ hearings in FY 1982. (App. Br. p. 7) "The vast majority of these hearing requests were disability cases. HHS has projected that hearing requests will

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Various committees of the Congress have held hearings investigating a variety of problems faced by beneficiaries in the CDI reviews.[33/] Representative

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reach 379,000 in fiscal year 1983. This increase will result in part from the requirement imposed by Congress in 1980 that the Secretary provide for a periodic review of the eligibility of individuals who are receiving disability benefits." (Footnotes omitted) Id.

33/ See, for example:

"Social Security Appeals and Case Review Process," Hearings before the Subcommittee on Social Security of the Committee on Ways and Means, Serial 97-31 (October 23 and 28, 1981);

"Possible Irregularities in Medical Examinations Purchased from 'Volume Providers' for the Social Security Disability Program," Hearing before the Subcommittees on Social Security and Oversight of the Committee on Ways and Means, Serial 97-55 (March 11, 1982);

"Disability Admendments of 1982," Hearings before the Subcommittee on Social Security of the Committee on Ways and Means on H.R. 5700, Serial 97-54, (March 16 and 17, 1982);

"Administration's Fiscal Year 1983 Legislative Proposals for Unemployed Compensation and Public Assistance,"

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Hearings before the Subcommittee on Public Assistance and Unemployment Compensation of the Committee on Ways and Means, Serial 97-62 (March 25, April 21 and 22, 1982);

"Social Security Disability Insurance Program Cessations and Denials," Select Committee on Aging, U.S. House of Representatives, Committee Print 344 (May 1982); and "Impact of Accelerated Reviews on Terminations and Denials," Committee Print 345 (May 1982);

"Oversight of Social Security Disability Benefits Terminations," Hearing before the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs, United States Senate (May 25, 1982);

"Social Security for Mentally Disabled," Hearing before the Special Committee on Aging, United States Senate (May 1983);

Hearing on Problems in the Social Security Review Process, Hearing before the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs, United States Senate (June 1983);

"Social Security Disability Review: A Federally-Created State Problem," Select Committee on Aging, U.S. House of Representatives [hearing in Washington, D.C. June 1983; four field hearings, 1983];

Hearing on the Problems in the Social Security Disability Program, Social Security Subcommittee, Ways and Means Committee, U.S. House of Representatives (June 30, 1983); and

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J.J. Pickle, Chair of the Social Security Subcommittee of the Ways and Means Committee and the sponsor of legislation to correct many of the problems, H.R. 3755, stated:

> "Unfortunately, a hasty and harsh implementation of one provision of the 1980 Amendments, that calling for a review of disabled beneficiaries at least once every three years, has magnified problems in the program a thousand fold and caused much pain for beneficiaries and much dislocation among agency personnel."34/

The problems "magnified" by the CDI process are, with very few exceptions,35/

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Hearing on Disability Issues in the Supplemental Security Income program, Subcommittee on Public Assistance and Unemployment Compensation, Committee on Ways and Means, U.S. House of Representatives (August 3, 1983).

34/ Opening Statement of Representative Pickle at the Hearing on Social Security Disability Insurance Program before the Social Security Subcommittee of the Ways and Means Committee, page 2 (June 30, 1983).

35/ The issue of whether the Secretary must have evidence of medical improvement before terminating benefits is not applicable to the initial applicant.

the same problems faced by the disabled individual applying for DI benefits. The sharp increases in terminations have been matched by decreases in allowances of applications. "The number of awards in 1981 was approximately the same as the 1970 figure, despite a 34-percent increase in the population insured by disability. As a result, the award rate in 1981 - 357 per 100,000 workers - fell far short of the 480-per-100,000 figure in 1970. In fact, the 357 awards per 100,000 in 1981 was by far the lowest rate in the history of the DI program.[36] In FY 1976, the denial rate at the initial application stage was 41.6%. Just six years later, in FY 1982, the Secretary denied 65.1% of the disability applications at the initial level.[37]

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[36] Lando, Farley and Brown, "Recent Trends in the Social Security Disability Insurance Program," Social Security Bulletin, Vol. 45, No. 8, pp. 3, 9 (August 1982).

[37] "Key Workload Indicators, FY '83," (May 1983) page 15.

The problems documented undermine all confidence in the quality and validity of the decisional process utilized by the Secretary. They make a mockery of the Secretary's representations to this Court that the delays are the "direct and foreseeable consequence - of the conscientious implementation of the Social Security Act..." [App. Br. p. 33.] The Congressional hearings have focused on a wide variety of serious problems. Problems include the Secretary's failure to: obtain all needed evidence prior to making a decision,[38] require that there be evidence of medical improvement before a person's benefits can be terminated;[39]

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[38] See, for example, "Oversight of Social Security Disability Benefits Terminations," Hearing before the Subcommittee of Government Management of the Committee on Governmental Affairs, U.S. Senate (May 25, 1982).

[39] See, for example, "Social Security Disability Insurance Program - Cessations and Denials," Select Committee on Aging, U.S. House of Representatives, Committee Print 344 (May 1982).

properly evaluate the impairments of the mentally ill in determining initial eligibility or continued disability;[40] consider the effects of pain in evaluating disability;[41] obtain and fully consider the medical opinions of the disabled beneficiaries' treating physicians;[42] follow decisions of the Circuit Courts of Appeals in other cases raising the same issue within the same circuit;[43] properly utilize the Administrative Procedure Act, 5 U.S.C. §553, in amending or issuing policy changes in the DI

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[40] See, for example, "Social Security for the Mentally Disabled," Special Committee on Aging, U.S. Senate (May 1983).

[41] See footnote 38, supra.

[42] Id.

[43] Id., see also "Disability Amendments of 1982," Hearings before the Subcommittee on Social Security of the Committee on Ways and Means, U.S. House of Representatives, Serial 97-54 (March 16 and 17, 1982).

program;[44] and properly regulate the use of consultative examiners while encouraging excessive reliance upon their opinions in determining if a person is disabled.[45]

The Courts of Appeals and the district courts have struck many of the Secretary's practices on the grounds that they violate various provisions of the Social Security Act.[46] In Mental

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[44] See footnotes 38, 40 and 43, supra.

[45] See footnote 40; see also, "Possible Irregularities in Medical Examinations Purchased from 'Volume Providers' for the Social Security Disability Program," Hearings before the Subcommittees on Social Security and Oversight of the Committee on Ways and Means, Serial 97-55 (March 11, 1982); letter of the General Accounting Office to Senator Metzenbaum, June 10, 1983, regarding "SSA Needs to Protect Against Possible Conflicts of Interest in Its Disability Programs" (GAO/HRD-83-65).

[46] In most cases, an individual has obtained the decision against the Secretary. Some of the decisions benefit state or region-wide classes. The

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Health Association of Minnesota v. Schweiker, 554 F.Supp. 157 (D.Minn. 1982), appeal pending 8th Circuit, the district court held that the Secretary was not properly evaluating the impairments of the mentally disabled, and that her policy was "arbitrary, capricious, irrational, and an abuse of discretion." 554 F.Supp. at 166. The court also held that the policy violated the APA, 5 U.S.C. §553, in that the policy was never published in the Federal Register and was instead issued through various policy memoranda and quality assurance returns

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Secretary does not feel obliged to follow Circuit Court of Appeals decisions with which she disagrees, except in the individual case. See discussion at footnotes 40 and 48. As a result and because no nationwide classes have been sought, circuit and district court opinions favorable to the plaintiff should not be construed by this Court to indicate that the quality of decision-making has improved nationally as a result of these suits.

to states in individual cases. 554 F. Supp. at 160-165, 166.[47]

District courts have required the Secretary to follow precedential Circuit Court decisions in which she had either "non-acquiesced" or which she had simply chosen to ignore.[48] Some circuit

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[47] See also, "Passing the Buck: Federal Efforts to Abandon the Mentally Disabled," A Report of the Office of the City Council President, New York City, 1982. Similar types of charges have been raised about the manner in which the Secretary evaluates specific physical impairments. See, for example, State of New York v. Heckler, 83 Civ. 5903 (S.D. N.Y. filed August 10, 1983) [challenging the Secretary's standards utilized in evaluating cardiac impairments]; Testimony of Floyd A. Davis, M.D., Director, Multiple Sclerosis Center, Rush-Presbyterian-St. Luke's Medical Center, on behalf of the National Multiple Sclerosis Society before the Social Security Subcommittee of the Ways and Means Committee, June 30, 1983 [discussing the inadequacy of the Secretary's standards for evaluating multiple sclerosis.]

[48] See Siedlecki v. Schweiker, Civil Action No. 82-61R (W.D.Wash. 1983);

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courts have expressed their surprise at the Secretary's failure either to follow their decisions or to appeal to this Court.[49/] Numerous courts have held

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Chee v. Schweiker, No. Civ.-82-693 PCT-VAC (D.Ariz. 1982); Morrison v. Heckler, Civil Action No. C 82-888V (W.D.Wash. 1983); Lopez v. Heckler, No. 83-0697-WPG[T] (C.D.Cal. June 16, 1983), appeal pending in the Ninth Circuit; stay granted on one portion of the district court's order, No. A-145 (Justice Rehnquist, September 9, 1983). The courts in Siedlecki and Chee require the Secretary to follow Finnegan, fn. 50, infra. Lopez requires the Secretary to follow Finnegan and Patti within the jurisdiction of the Ninth Circuit. Pursuant to the Morrison order, in the State of Washington, the Secretary must follow Patti; Griffis v. Weinberger, 509 F.2d 837 (9th Cir. 1975) [proper evaluation of alcoholism]; Day v. Weinberger, 522 F.2d 1154 (9th Cir. 1975); and Rhodes v. Schweiker, 660 F.2d 722 (9th Cir. 1981) [Day and Rhodes address the Secretary's failure to provide proper weight to the evidence submitted by the disabled individual's treating physician.]

49/ For example, in Nelson v. Heckler, CCH Unemp. Ins. Rptr. ¶14,684 (8th Cir. July 26, 1983), the court found error in the Appeals Council's failure to fully consider the claimant's testimony

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either that (a) the Secretary cannot terminate benefits without evidence of medical improvement or without evidence that the original decision was clearly erroneous, or (b) once a person is found by the Secretary to be disabled, there is a presumption that he remains disabled.[50]

The General Accounting Office (GAO) has expressed similar concerns and reached similar conclusions about

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regarding pain, citing four earlier decisions of the Eighth Circuit which were directly on point. The court then stated, "For some unexplained reason, the Secretary insists upon ignoring this Court's statements with respect to the proper evaluation of pain."

50/ See, for example, Miranda v. Secretary of Health, Education and Welfare, 514 F.2d 996 (1st Cir. 1975); Patti v. Schweiker, 669 F.2d 582 (9th Cir. 1982); Trujillo v. Heckler, Civil Action No. 82-K-1505 (D. Colo. August 16, 1983); Finnegan v. Mathews, 641 F.2d 1340 (9th Cir. 1981); Kuzmin v. Heckler, No. 82-5705 (3d Cir. August 18, 1983). Finnegan and Kuzmin address the medical improvement issue in the SSI context.

the Secretary's actions. In response to a request from Senator Heinz, the GAO investigated SSA's policies and procedures for determining the eligibility of mentally impaired persons. The GAO reported:

> Our review revealed several weaknesses in SSA's and DDS's adjudicative policies and practices. Specific weaknesses we identified were:
>
> (1) an overly restrictive interpretation of the criteria to meet SSA's medical listings, resulting principally from narrow assessments of individuals' daily activities;
>
> (2) inadequate development and consideration of a person's residual functional capacity and vocational characteristics;
>
> (3) inadequate development and use of existing medical evidence, resulting in an over-reliance and misuse of consultative examiners; and
>
> (4) insufficient psychiatric resources in most state DDSs.51/

51/ Statement of Peter J. McGough, Office of Program Planning, General Accounting Office, before Senate Special Committee on Aging, April 7, 1983, reprinted in the Congressional Record, pp. S 5216-5220 (April 26, 1983).

The GAO also reviewed 40 decisions where SSA had issued termination or denial notices to mentally impaired individuals and concluded that SSA's judgment was incorrect in 27 cases. In the remaining 13, GAO found that more information should have been obtained before an informed decision could be made:

> ...[W]e found many individuals who had their benefits terminated despite having severe impairments, and in our opinion, having little or no capability to function in a competitive work environment. We had 40 of the denial and termination cases reviewed by our clinical psychologist and she concluded that in 27 of the cases the individuals could not work in a competitive or stressful environment. In an additional 13 cases she concluded that more medical or psychosocial information or trial work experiences were needed to make an informed decision.52/

The press has published numerous articles which document the connection

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52/ Id. at S 5217.

between these policies and procedures, the overwhelming numbers of incorrect terminations, and the human suffering which resulted when the disabled person's appeal was stalled, along with hundreds of thousands of others, in the administrative process.[53/] Numerous editorials

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53/ Numerous articles documenting the suffering of disabled beneficiaries who SSA has terminated have appeared in the press. See, for example, "Shame! Death by regulation and other Social Security tragedies," The Boston Phoenix (January 26, 1982); "Disability Purge Ruinous to Many," Los Angeles Times, page 1 (March 21, 1982); "Through the Safety Net," Philadelphia Inquirer, page 1-A (March 21, 1982); "Cuts in U.S. Aid to Disabled Lead to 'Horror Stories,' Panel Told," Los Angeles Times, page 1-3 (April 9, 1982); "'Purge' of Disabled from Benefit Rolls Alleged at Hearing," Daily Journal, page 1 (April 9, 1982); "Fairness of Reagan's Cutoffs of Disability Aid Questioned," New York Times, p. 1 (May 9, 1982); "Disabled: What happens when Uncle Sam says you're OK?" Akron Beacon Journal, page D1(July 11, 1982); "Congress Considers Revising Review Procedures for Disability Payments to Aid the Beneficiaries," Wall Street Journal, page 48 (August 18, 1982); "Disability: Question of benefit

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eligibility leaves thousands in limbo," The Sunday Gazette-Mail (W.Va.), page 1E (August 29, 1982); "U.S. Gets Tough with Disabled: Eligible Recipients Losing Out," Washington Post, page 1 (September 7, 1982); "Bill Promised to Curb Disability Cutoff Abuses," Los Angeles Times, page 5 (September 19, 1982); "Unjust Social Security Cutoffs Laid to State," The Boston Globe (October 6, 1982); "Wheelchair-bound: Appeal drags on for disabled woman whose checks were cut off," Richmond News Leader, page 1E (October 18, 1982); "Poor, disabled suffer budget-cut hardships," News-Press (Santa Barbara, Calif.), page B1 (October 26, 1982); "Survival: The System v. Walter Davis," Philadelphia Daily News, page 4 (November 11, 1982); "Social Security Cutbacks Border on Terrorization," Southwest Times Record (Fort Smith, Arkansas), (November 14, 1982); "Social Security cutoffs criticized: Citing disabled, GAO faults wholesale terminations," Philadelphia Inquirer (December 14, 1982); "Social Security Told to Restore Mentally Ill Benefits: Judge Rules Cutoff Standards Faulty in Midwest," Washington Post (December 24, 1982); "Many in need losing Social Security disability benefits," The Day (New London, Connecticut) (January 2, 1983); "Social Security: A Systematic Breakdown; Social Security's a Little Short of Heart, Too," Philadelphia Daily News (February 16, 1983); "In the New Rush for Budget Savings, A Life is Trampled," Washington Post, page 3 (May 27, 1982); "Prattville Woman Wages War on Social Security Agency," The Alabama Journal (June 28, 1983); U.S. 'stress test' adds to trouble of heart patients," St. Petersburg Times (July 10, 1983); "The Disability Nightmare," Newsday (March 21, 1983).

document the intensity of both the human suffering and the public outcry at the heartlessness and illegality of the Secretary's policies.[54/]

The Secretary's brief portrays an image of the disability insurance system which contrasts sharply with this persistent criticism and concern over its operation since early in 1981. The brief is, in

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[54/] Editorials have consistently decried the unfairness of the Secretary's policies and the consequences for disabled individuals left without benefits while they appeal. See, for example, "Cut,Cut... Think, Think," Los Angeles Times (March 25, 1982); "Safety Net Shrinks," Commercial Appeal (Tennessee) (June 5, 1982); "Taking up cause of the disabled," Seattle Post-Intelligencer, page A8 (June 28, 1982); "Wielding ax is no way to trim disability rolls," Philadelphia Inquirer, page 8A (September 18, 1982); "Questioning disability decisions," The Boston Globe, page 14 (October 14, 1982); "Protect rights of disabled," Philadelphia Inquirer, page 14-A (June 7, 1983); "Plight of the Disabled," Los Angeles Times, page II-6 (June 9, 1983); "Disability review changes: 'By no means a solution,'" Philadelphia Inquirer, page 22-A (June 9, 1983); "Not Fair Enough for the Disabled," New York Times, page A22 (June 14, 1983).

fact, inconsistent with Secretary Heckler's recent observation that the CDI reviews have resulted "in hardships and heartbreaks for innocent and worthy disability recipients who would fall through the cracks of the existing long-time, paper-oriented review process that had never before had to cope with such an overwhelming workload."[55/] Secretary Heckler's public statements also support amici's position that this Court can no longer rely upon the "fairness and reliability of the existing pretermination procedures," Mathews v. Eldridge, 424 U.S. 319,343 (1975). She has publicly stated that the system is "too insensitive, too bureaucratic. Mistakes were too easy to make -- and too hard to rectify." (emphasis added.)[56/]

[55/] "Statement of Margaret M. Heckler, Secretary of Health and Human Services," HHS News Release, page 3 (June 7, 1983).

[56/] Id.

Unlike the data available at the time of the Eldridge decision, there is now a well-developed body of research, hearings, and litigation which conclusively establishes the horrible truth of Secretary Heckler's words. The current system is not designed to encourage, much less assure, accurate decision-making. In the context of the hardships faced by DI claimants and beneficiaries who attempt to cope while "left to drift"[57/] as they await appeals decisions (see Section I, supra), this failure to provide accurate decisions dictates a reading of the term "reasonable" in §205(b) which may require even shorter time frames than those imposed by the district court. Further, this failure to provide accurate decisions is contrary to the Secretary's argument to this Court that "it is

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[57/] Senator Armstrong, see fn. 4, supra.

simply inconceivable" that anything but the current processing times would be required of her because these delays "are such an entrenched feature - and direct and foreseeable consequence - of the conscientious implementation of the Social Security Act by Congress and the Secretary..." [App. Br. p. 33]. Nothing in the legislative record reflects that the Congress contemplated the high degree of inaccuracy nor the impact which the delays would have upon disabled people's lives. The Congress' reactions are discussed further in Part III.

III. The district court's exercise of its equitable power in fashioning the relief was appropriate, necessary, and is consistent with the Congress' own actions in addressing the severe consequences of SSA's administrative delays.

The purpose of this Section is to put in perspective the district court's exercise of its equitable powers to fashion a remedy in light of the Congress'

own actions in this area. In addition to the many Congressional hearings, numerous bills have been introduced in this Congress to make major reforms in the disability determination process.[58] Further, late in 1982, Congress passed H.R. 7093, now P.L. 97-455, which provides that benefits will be continued through the ALJ level of review.[59]

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[58] See, for example, H.R. 2987 (introduced by Rep. Shannon, member Social Security Subcommittee, Ways and Means Committee); H.R. 3755 (introduced by Rep. Pickle, chair of the Social Security Subcommittee, after mark-up by the Subcommittee in July 1983); S. 476 (introduced by Senators Levin and Cohen).

[59] The Secretary attempts to minimize this legislation because it is "temporary." (App. Br. p. 49) The benefit of Section 2 is only available to those terminated prior to October 1, 1983 and, then, benefits cannot be received after June 1, 1984, even if the ALJ decision has not been issued. Legislation pending in both the House (H.R. 3755) and Senate (S. 476) would amend the Act to provide for continued benefits through the ALJ level in Title II cases. H.R. 3755, sponsored by Rep. Pickle, Chair of the

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The Secretary mistakenly argues that the Congress "has not chosen to authorize the payment of interim benefits solely because of the passage of time in processing claims for disability benefits." (App. Br. p. 18) While it is true that interim payments are not payable under 42 U.S.C. §405(g)(5) to disabled individuals, the Secretary's sweeping statement effectively ignores the fact that in 1982, in response to high numbers of erroneous terminations and lengthy appeal times, the Congress provided that Title II recipients can continue to receive their benefits while they appeal, through the ALJ level. P.L. 97-455, Section 2, 42 U.S.C. §423(g).

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Social Security Subcommittee of the Ways and Means Committee, was reported out by the Subcommittee in July 1983 and is awaiting imminent consideration by the full Committee.

The Congressional debate of this bill reflects that "passage of time" was central to the members' concerns. Senator Metzenbaum specifically noted the "long appeal process":

> "The tragedy is that while two-thirds of those who appeal their termination decisions eventually have their benefits restored by an administrative law judge, they are often left with no other source of income during this long appeal process. Of the 32 deaths, in almost every case a surviving relative, the treating physician, or some other interested person has stated their belief that the wrongful termination decision and resulting loss of benefits was a contributing factor in the person's death." (emphasis added)
>
> Congressional Record, p. S 13853 (December 3, 1982)

Senator Boren, a member of the Finance Committee, stated:

> "Cutting off someone's disability benefits before he's had a chance for a full hearing is sort of like declaring someone guilty before they are proven innocent. We should not penalize those with true need

> because of bureaucratic backlogs. I am the first one to want to reduce Federal spending, but it is not right to use Government delays to deny funds to those who are truly helpless for physical reasons." (emphasis added)
>
> Congressional Record, p. S 13855-6 (December 3, 1982).

Similarly, Senator Cohen, chair of the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs, which has held two extensive hearings investigating the DI crisis, stated:

> "The tragedy is that, in waiting for reinstatement, these severely disabled persons and their families must go without benefits for months - or even a year or more - due to the tremendous backlog of appeals. (emphasis added)
>
> Congressional Record, p. S 13856 (December 3, 1982)

Senator Heinz, a member of the Finance Committee and chair of the Senate Special Committee on Aging which has held extensive hearings on SSA's

treatment of the mentally impaired, stated:

> "[This] bill means that for the immediate future, at least, individuals who have been wrongfully terminated will not be financially ruined because they have been deprived of their benefits during a lengthy appeals process. I have seen in my own State of Pennsylvania and elsewhere across the country - where individuals have lost their homes and sustained other financial damages because they were deprived of their benefits during a long appeals process which resulted in a determination that they never should have been kicked off the rolls at all." (emphasis added)
>
> Congressional Record, p. S 13857 (December 3, 1982)

Senator Pryor, a member of both the Finance Committee and the Special Committee on Aging who held hearings on DI issues in his home state of Arkansas, stated:

> "Testimony at the hearing was heard from several witnesses who have had their benefits terminated and eventually reinstated. The lengthy appeals process that these individuals must endure can take anywhere from 6 to 18

> months during which the beneficiary may be receiving no income and suffering from great financial, emotional, and physical strain." (emphasis added)
>
> Congressional Record, p. S 13862 (December 3, 1982)

Senator Robert Byrd also referred to lengthy delays, describing the months as "this waiting period limbo:"

> The waiting period for a review of the termination decision can be as long as a year. And, for many people - who are without other income - this is simply too late. Seriously ill people are forced to sell their homes or take other desperate, irreversible actions. Regrettably, most of us in this body have heard of suicides by individuals who grew terribly despondent during this waiting period limbo. Other people have actually died from their disability during this time." (emphasis added)
>
> Congressional Record, p. S 13867 (December 3, 1982)

Senator Levin, ranking minority member of the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs, who along with

Senator Cohen conducted two hearings investigating the DI crisis and who is the co-sponsor of S. 476, earlier explained his interest in a similar provision included in another bill:

> Mr. President, my proposal parallels the right of continuing disability benefits presently afforded SSI Disability recipients. Many title II disability insurance beneficiaries are also living at subsistence level and the loss of benefits during appeal has proven to be devastating. What financial security these people have come to realize is virtually destroyed during the appeal period between termination and restoration of benefits. The restored benefits, in over 70 percent of the appealed cases - many times 6 to 12 months later, come too late to stop a foreclosure or eviction, or lessen the emotional trauma which has driven some to such a severe and chronic state of nervous anxiety that they have taken their own lives. (emphasis added)
>
> Congressional Record, p. S 15104 (December 11, 1981)

Therefore, in requiring that the Secretary make interim payments to

claimants who did not receive timely administrative action, the lower courts' actions were consistent with recent Congressional policy in recognizing the harms occasioned by lengthy delays.

CONCLUSION

For all of the reasons outlined above, and those set forth in appellees' brief, amici urge affirmance of the decision of the Second Circuit Court of Appeals.

NO. 82-1371

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IN THE

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OCTOBER TERM, 1983

MARGARET M. HECKLER, Secretary of Health and Human Services,

Petitioner,

—against—

LEON S. DAY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE CITY OF NEW YORK *AMICUS CURIAE*

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TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF ARGUMENT	4
POINT I—Plaintiffs are entitled to relief from the Secretary's violation of their right to reasonably prompt review of denials of benefits	5
A. The plaintiffs' statutory right to reasonably prompt administrative reviews of denials of disability claims was violated by the pervasive, lengthy and unexplained delays caused by the Secretary	5
B. The Secretary's argument is without merit because it misinterprets the decisions below and constitutes an indirect attack on the power of Federal courts to interpret and enforce statutes	12
POINT II—The equitable relief ordered by the District Court was well within its discretionary powers in that it provided relief that is both appropriate and limited to redressing plaintiffs' injuries	17
CONCLUSION	23

PAGE

Table of Authorities

Cases Cited

Adickes v. *Kress & Co.*, 398 U.S. 144 (1970) 19

Alexander v. *Hill*, 707 F.2d 780 (4th Cir. 1983) 9

Barnett v. *Califano*, 580 F.2d 28 (2d Cir. 1978) ..5, 6, 8, 16

Blankenship v. *Secretary of HEW*, 587 F.2d 329 (6th Cir. 1978) 6, 20

Califano v. *Yamasaki*, 442 U.S. 682 (1979) 13, 20-22

Caswell v. *Califano*, 583 F.2d 9 (1st Cir. 1978) ..6, 16, 22

Cornelius v. *Minter*, 395 F.Supp. 616 (D. Mass. 1974) 6, 9

Edelman v. *Jordan*, 415 U.S. 651 (1974) 19

F.T.C. v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965) 13

Fortin v. *Commissioner of the Massachusetts Department of Public Welfare*, 692 F.2d 790 (1st Cir. 1982) 9

Heckler v. *Campbell*, —— U.S., ——, 103 S.Ct. 1952 (1983) 15, 16, 19

Hills v. *Gautreaux*, 425 U.S. 284 (1976) 18

Kaynard v. *Mego Corp.*, 633 F.2d 1026 (2d Cir. 1980) 18

Like v. *Carter*, 448 F.2d 798 (8th Cir. 1971), *cert. denied*, 405 U.S. 1045 (1972) 6

Lopez v. *Heckler*, 52 U.S.L.W. 2031 (C.D. Cal. 1983), *app. pending* (9th Cir.) *stay pending app. granted*, No. A-145 (Sept. 9, 1983 U.S. Sup. Ct.) (Rehnquist, J.) 11, 12

PAGE

Martinez v. *Weinberger*, No. 73 Civ. 900 (E.D.N.Y. 1978) (unrep. dec. & order of Nickerson, D.J.) 2, 3

Mathews v. *Eldridge*, 424 U.S. 319 (1976) 6, 10, 13

Mental Health Assoc. of Minnesota v. *Schweiker*, 554 F. Supp. 157 (D. Minn. 1982) 12

Milliken v. *Bradley*, 433 U.S. 267 (1977) 18

National Petroleum Refiners Assn. v. *F.T.C.*, 482 F. 2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974) 13

Nelson v. *Sugarman*, 361 F. Supp. 1132 (S.D.N.Y. 1972) 10, 11

Rivers v. *Schweiker*, 692 F.2d 871 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 1783 (1983) 18

Shands v. *Tull*, 602 F.2d 1156 (3d Cir. 1979) 9

Sharpe v. *Harris*, 621 F.2d 530 (2d Cir. 1980) 2, 3, 5, 8

Swann v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971) 18

White v. *Mathews*, 559 F.2d 852 (2d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978) 5, 6, 8, 16, 17

Wright v. *Califano*, 587 F.2d 345 (7th Cir. 1978)..6, 7, 14-16

Statutes and Regulations

Federal

Aid to Families with Dependent Children,

42 U.S.C.:

Secs. 601, *et seq.* 9

Sec. 602(a)(10) 6, 9

Sec. 603(i)(1) 10

PAGE

Coal Mine Health and Safety Act of 1969, 30 U.S.C. §901, *et seq.* 17

Social Security Act:

Title II, 42 U.S.C.:

Sec. 401, *et seq.* 2

Sec. 404(a)(Sec. 204[a]) 20

Sec. 405(b) (Sec. 205[b]) ..... *passim*

Sec. 405(g) (Sec. 205[g]) 22

Title XVI, 42 U.S.C.:

Sec. 1381, *et seq.* 2, 17

Sec. 1383(c)(1) 2

Sec. 1383(g) 3

45 C.F.R.:

Sec. 205.10(a)(16) 9

Sec. 205.42 10

Sec. 206.10(a)(3)(i) 9

State

New York State Social Services Law, Sec. 157 (McKinney's 1983) 3

Other

S. Rep. No. 1856, 86th Cong. 2d Sess. *reprinted in* [1960] *U.S. Code Cong. and Ad. News* 3608, 3623 4

H. Rep. No. 92-231, 92d Cong. 2d Sess. *reprinted in* [1972] *U.S. Code Cong. and Ad. News* 4989, 4992 4

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BRIEF FOR THE CITY OF NEW YORK *AMICUS CURIAE*

Interest of the *Amicus Curiae*

The City of New York ("City") submits this brief in support of the respondents' position that section 205(b) of the Social Security Act, 42 U.S.C. §405(b), provides

an enforceable right to a prompt disposition of appeals of determinations of ineligibility for Social Security disability benefits.

The City seeks to protect two distinct important interests—the right of its disabled citizens to a prompt resolution of appeals from determinations of ineligibility for disability benefits; and the protection of its own fisc, for the benefit of all of its citizens, which is drained by the provision of locally-financed assistance during the pendency of disability claims.

As for the injury to the City's disabled, the Secretary is under two court orders in New York to process promptly appeals from denials of eligibility for disability benefits. These orders protect the rights of claimants both under Title II of the Social Security Act ("SSA"), 42 U.S.C. §§401, *et seq.* ("SSD" benefits), and under Title XVI, 42 U.S.C. §§1381, *et seq.* (Supplementary Security Income or "SSI" benefits). In *Martinez* v. *Weinberger*, No. 73 Civ. 900 (E.D.N.Y. 1978) (unrep. dec. & order of Nickerson, D.J.), the district court ordered that in all appeals of SSD and concurrent SSD/SSI cases, the Secretary must issue decisions within 120 days from the date the appeal was filed (unless certain exceptional situations were present); and in *Sharpe, et al.* v. *Harris*, 621 F.2d 530 (2d Cir. 1980), the Court of Appeals affirmed the lower court's order imposing the same time limits as in *Martinez* for the disposition of SSI appeals. These courts were, as are the courts below, merely enforcing the claimants' statutory rights to a "reasonable . . . opportunity for a hearing." 42 U.S.C. §405(b) (SSD); 42 U.S.C. §1383(c)(1) (SSI). The City seeks to ensure that these rights are not derogated.

Second, the City has a fiscal interest in the affirmance of the decision rendered by the court below. During the pendency of their appeals, the claimants receive local public

assistance. In New York, most of these individuals would receive "Home Relief" benefits, which are 50% funded by the City. *See* New York Social Services Law §157 (McKinney's 1983). The longer the period of time between the initial determination of ineligibility and the disposition of the appeal, the greater the amount of assistance the City and other localities will have to pay.*

The fiscal impact on the City of delays in the resolution of appeals is significant. In addition to its administrative costs, the City pays over $2.54 million annually to every 1,000 recipients of Home Relief benefits. Prior to the rendering of relief in *Sharpe, supra,* the City incurred costs of over $400,000 for the Home Relief benefits it paid to every 1000 members of the class during the two-month period which the Secretary delayed beyond the time period the court found reasonable for the resolution of appeals. Similarly, in *Martinez, supra,* the court found that the average delay in disposing of appeals filed by SSD applicants exceeded 200 days. Accordingly, the City incurred at least $1.2 million for the benefits it paid to the class members for the three-month excess time period.

That the Secretary's delays in resolving appeals should have a negative fiscal impact on the City is ironic, in light of Congress' original purpose in enacting the SSA of easing the financial burden on localities caused by ever increasing public assistance costs. Congress re-stated this purpose when it subsequently amended the SSA to enlarge

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* The City receives automatic reimbursement from the Secretary for the public assistance it has paid to individuals who are ultimately determined to be eligible for SSI benefits. *See* 42 U.S.C. §1383(g). But, the City does not receive such automatic reimbursement for assistance paid to SSD claimants who ultimately are determined eligible after appeals.

the numbers and types of individuals to receive benefits thereunder.*

Summary of Argument

The courts below properly construed section 205(b) of the Social Security Act, 42 U.S.C. §405(b), as mandating that claimants who are denied disability benefits are entitled to administrative review within a reasonable time, and that pervasive, lengthy and unaccountable delays by the Secretary violate that statutory right. Courts of Appeals for two other Circuits have adopted the same interpretation. Moreover, the Secretary has so construed similar language in other benefits programs as authority for imposing deadlines on states and localities.

The Secretary's argument here misconstrues the statutory interpretation given 42 U.S.C. §405(b) by the lower courts, and confuses the legally distinct issues of statutory interpretation and relief for violation of a statutory right.

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* The legislative history of the 1960 amendments, which repealed the age limits found in the original version of the Title II disability program, shows a continued Congressional realization of the drain on state and local treasuries caused by assistance payments. "Many [of the disabled] who would be eligible for disability benefits except for the age limitation are now receiving payments under public assistance programs [including locally funded assistance]. With insurance benefits available to them, some of these individuals would no longer need assistance payments." S. Rep. No. 1856, 86th Cong. 2d Sess. *reprinted* in [1960] *U.S. Code Cong. and Ad. News* 3608, 3623. The estimated savings in public assistance funds was to be $28 million. *Id.* The legislative history of the Title XVI program also reflects a Congressional intent that fiscal resources of localities be conserved. *See* House Rep. No. 92-231, 92d Cong. 2d Sess. *reprinted in* [1972] *U.S. Code Cong. and Ad. News* 4989, 4992.

Her defenses to plaintiffs' claim—the need for accuracy and the lack of adequate resources—are without merit.

The relief ordered by the district court was appropriate and limited to redressing the injuries found. It may not be overturned because it was not an abuse of discretion, and it was not precluded expressly or impliedly by the United States Constitution or by statute. Moreover, the type of relief ordered here has been expressly approved by this Court in a similar context.

The decision of the Court of Appeals should be affirmed.

POINT I

Plaintiffs are entitled to relief from the Secretary's violation of their right to reasonably prompt review of denials of benefits.

A. The plaintiffs' statutory right to reasonably prompt administrative reviews of denials of disability claims was violated by the pervasive, lengthy and unexplained delays caused by the Secretary.

The Court of Appeals ruled for the fourth time that the provision of the Social Security Act ("SSA") requiring a "reasonable . . . opportunity for a hearing . . .," 42 U.S.C. §405 (b) ("section 405[b]"), mandates that the appeals taken thereunder be resolved reasonably promptly. *See Sharpe* v. *Harris*, 621 F.2d 530 (2d Cir. 1980); *Barnett* v. *Califano*, 580 F.2d 28 (2d Cir. 1978) ("Substantial delays suffered by [SSI] claimants deprived them of a "reasonable . . . opportunity for a hearing."); *White* v. *Mathews*, 559 F.2d 852 (2d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978). The *White* court noted that section 405(b) gives

"the [SSD] claimants a right to a hearing within a reasonable time," and that "the Secretary [did not] dispute this construction." *White*, 559 F.2d at 858.

Moreover, in both cases, the courts found that the plaintiff classes were seriously harmed by the delays they experienced. *White, supra*, 559 F.2d at 858-59, quoting this Court's decision in *Mathews* v. *Eldridge*, 424 U.S. 319, 342 (1976); *Barnett, supra*, 580 F.2d at 31-32 (SSI recipients are even more harmed by delays than the SSD claimants in *White* because by definition they are needy). Furthermore, in *White*, the court also held that unreasonable delays "detract seriously from the effectiveness of the [disability] program." 559 F.2d at 858.

The Sixth Circuit in *Blankenship* v. *Secretary of HEW*, 587 F.2d 329 (6th Cir. 1978), and the First Circuit in *Caswell* v. *Califano*, 583 F.2d 9 (1st Cir. 1978), have reached the same conclusion.* Even the Seventh Circuit, which alone among the circuits has refused to impose time deadlines on the Secretary, has ruled that, as a threshold legal matter, section 405(b) requires the Secretary "to provide rulings within a reasonable time." *Wright* v. *Califano*, 587 F.2d 345 (7th Cir. 1978). The court "readily agree[d] that

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*These courts have read the "reasonable . . . opportunity for a hearing" provision in the same way that other courts have interpreted similar language found in the statutes enacting other benefit programs. For example, in *Cornelius* v. *Minter*, 395 F. Supp. 616, 621 (D. Mass. 1974), the court found that a delay of two to six months for the determination of eligibility for Aid to Families with Dependent Children violates the statutory requirement that "aid . . . shall be furnished with reasonable promptness." 42 U.S.C. §602 (a)(10). The court stated that "courts are uniquely situated to determining [*sic*] what time period is reasonable in such a situation." *Id.* at 621. *See also Like* v. *Carter*, 448 F.2d 798 (8th Cir. 1971), *cert. denied*, 405 U.S. 1045 (1972).

such delays may undercut the purposes of the Act." *Id.* at 381.*

Having correctly determined the threshold issue—that the language "reasonable . . . opportunity for a hearing" has meaning—the courts below defined what is "reasonable" under the circumstances. The district court correctly focused on the factual record before it, just as the other courts focused on the records before them, and fashioned the relief accordingly. And, the Court of Appeals correctly determined that, based upon a review of the factual cir-

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* In *Wright*, the holding in the Secretary's favor was very narrow and was based solely on the factual record before it. The court affirmed the district court finding that "there have been long delays at each step of the appeals process" for old age and survivors benefits. *Id.* at 347. The court also noted that plaintiffs' interest in prompt action is "beyond dispute" and that their impoverished position as a result of delays was such that they suffered deprivations that cannot be "fully compensated for by the provision of retroactive benefits," if ultimately found eligible. *Id.* at 351. However, in *Wright*, unlike the other cases, and in stark contrast to the instant case, the plaintiffs failed to allege and prove that the length of time taken was due to dilatory or otherwise unexplainable conduct by the Secretary. *Id.* at 352-53. Thus, the court had before it only the unrebutted bald assertions by the Secretary that the delays were due solely to an "explosion" in the number of claims to be processed and limitations on resources. *Id.* at 353. As a result, the *Wright* court found for the Secretary only on the very narrow ground that the delays were not "so unreasonable as to constitute a breach of the applicants' statutory rights justifying the extraordinary remedy imposed." 587 F.2d at 347. The district court's order in *Wright* considerably exceeded that of the instant case. *Wright, supra*, 587 F.2d at 348. *Cf.*, Point II, *infra*.

cumstances, the delays in Vermont were unreasonable as a matter of law.*

In determining whether the delays were reasonable, the district court reviewed the same factors as did the other courts: a) the claimants' interest in receiving a prompt decision and the resulting hardship when such decision is delayed; b) the interest of both the agency and claimant in an accurate determination; c) the length of the delays; and d) the reason for such delays. App. at 12a-18a, 27a-29a. *See White, supra,* 559 F.2d at 852.

The Secretary does not dispute that the delays in Vermont were lengthy. Nor can she dispute that, as a result of these delays, claimants suffered hardships. She does argue, somewhat disingenuously, that prompt decisionmaking may conflict with the interest of ensuring that the decisions are accurate.

Claimants share the Secretary's interest in accurate determinations of eligibility. But, the Secretary never elucidates how this need causes delay (other than when the ALJ needs more time to acquire additional information, which is a situation excluded from the district court's order).

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* In this appeal, the Secretary criticizes the Court of Appeals for not giving due consideration to her arguments. (*See* Pet. Br. at 36.) The Secretary neglects to mention, however, that the court found that the arguments were "almost indistinguishable" from those already decided in *Sharpe, Barnett,* and *White.* In all of these cases, the Secretary has argued that the courts should not interfere because Congress was looking into the issue and because the Secretary had absolute discretion apparently to take forever to schedule review hearings. Aside from the merits, the Secretary also argued in each case that the courts have no jurisdiction over the claims and that class certification is improper.

In regulating the operation of federally funded, but locally administered, public assistance programs, the Secretary expects state and local agencies to make prompt and accurate determinations at all stages of the application process. For example, in regulating the Aid to Families with Dependent Children ("AFDC") program, 42 U.S.C. §§601 *et seq.*, the Secretary requires that initial determinations of eligibility be made within 45 days of application, 45 C.F.R. §206.10(a)(3)(i), and that all appeals of adverse initial determinations or of discontinuances or reductions of aid be made, and implemented, within 90 days. 45 C.F.R. §205.10(a)(16).

The Secretary's argument here that section 405(b)'s requirement of a "reasonable . . . opportunity for a hearing" has no meaning is undercut by her reading of similar statutory language as the basis for imposing the above-described deadlines on the states and localities. The Social Security Act mandates that AFDC "be furnished with reasonable promptness." 42 U.S.C. §602(a)(10). That language is the basis of the Secretary's requirement that eligibility be determined within 45 days, regardless of the number of pending applications or the administrative resources available. This interpretation has been consistently upheld by the courts. *See Alexander* v. *Hill*, 707 F.2d 780 (4th Cir. 1983); *Fortin* v. *Commissioner of the Massachusetts Dept. of Public Welfare*, 692 F.2d 790, 793 n.1 (1st Cir. 1982); *Cornelius* v. *Minter*, 395 F. Supp. 616 (D. Mass. 1974). The "reasonable promptness" language is also the statutory basis for the Secretary's requirement that appeals of determinations of ineligibility be resolved, and the decisions implemented, within 90 days. *See Shands* v. *Tull*, 602 F.2d 1156, 1160 (3d Cir. 1979). It is ironic that the Secretary does not hesitate to impose time deadlines on state and local governments, but is not prepared to abide by such deadlines herself.

In calling to this Court's attention the conflict between prompt decisionmaking and accuracy in SSD determinations, the Secretary notes no such conflict in administering the AFDC program. At the same time as the Secretary requires the localities to render promptly difficult determinations of eligibility,* she also requires that such determinations be accurate. The states and localities are subject to financial penalties for the errors they make. *See* 42 U.S.C. §603(i)(1); 45 C.F.R. §205.42.

Nor has the Secretary, in the past, given the state and localities the degree of flexibility that she asks this Court to grant her, for the making of a "good faith" effort to meet "prompt" decisionmaking deadlines. For example, in *Nelson* v. *Sugarman*, 361 F. Supp. 1132 (S.D.N.Y. 1972), the Secretary argued to the court, as an *amicus*, that the City and the State of New York should be held strictly to the deadline imposed by the regulations for the disposition of appeals and implementation of decisions. In that case, the court rejected arguments regarding high caseloads and "inadequate resources" which are strikingly similar to those

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*This Court in *Mathews* v. *Eldridge*, 424 U.S. 319, 343-44 (1976), acknowledges that determinations of eligibility for needs-based cash benefit programs may be more difficult than disability determinations:

> [In determining continued eligibility for Title II benefits] a medical assessment of the worker's physical or mental condition is required. This is a more sharply focused and easily documented decision than the typical determination of welfare entitlement. In the latter case, a wide variety of information may be deemed relevant and issues of witness credibility and veracity often are critical to the decisionmaking process.

made by the Secretary here. *Nelson*, 361 F. Supp. at 1138-1141.*

Finally, this Court should look at one other circumstance that is relevant in determining the reasons for the delay: that they are largely a result of the Secretary's own improper or illegal actions. In effect, she comes to this Court with "unclean hands." Accordingly, it would be both unreasonable and unfair to excuse lengthy delays in resolving appeals.

First, the caseload has increased as a result of the Secretary's official policies encouraging state disability agencies and ALJ's to disregard judicial precedent. The Secretary issues Social Security Rulings of "non-acquiescence" to federal court decisions, ordering that the ruling not be adhered to in any other case. The resulting lack of uniformity in decisionmaking causes numerous remands from the federal courts and contributes to the backlog of cases. This non-acquiescence policy has been challenged and preliminarily enjoined. *See, e.g., Lopez* v. *Heckler*, 52 U.S.L.W. 2031 (C.D. Cal. 1983), *app. pend-*

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* There are presently 860,000 recipients of locally administered public assistance in the City of New York. Each year about 250,000 individuals are added to the public assistance rolls (and a similar number of cases are closed). The City must decide the eligibility of each of these individuals within 45 days. In addition, each year about 90,000 "fair hearing" appeals are held. The State of New York must resolve each of these within 90 days. This huge, and ever increasing, number of initial determinations and hearings creates great strain on the City and on the State of New York. Ironically, the Secretary's actions in finding fewer people who apply to be eligible for SSD and SSI, in cutting off those individuals already receiving benefits and in delaying the disposition of their appeals adds to the pressures on the State and local systems, which, as a result, must determine the eligibility of many more individuals for local public assistance.

ing (9th Cir. 1983), *stay pending app. granted sub nom. Heckler* v. *Lopez*, No. A-145 (U.S. Sup. Ct. Sept. 9, 1983) (Rehnquist, J.).

In addition, the Secretary has required the use of unpublished, medically incorrect and otherwise illegal standards in evaluating claims of disability. The use of such standards in evaluating claims of disability by virtue of mental illness has been successfully challenged. *See Mental Health Assoc. of Minnesota* v. *Schweiker*, 554 F. Supp. 157, 166 (D. Minn. 1982) ("The policy . . . violates the Social Security Act, the implementing regulations thereunder, the requirements of case law, and is arbitrary, capricious, irrational, and an abuse of discretion"). Other suits challenging these illegal standards are pending.* Until these lawsuits are resolved, many individuals have been and are being initially denied or subsequently terminated from the SSD program, and the number of appeals has and will increase.

B. The Secretary's argument is without merit because it misinterprets the decisions below and constitutes an indirect attack on the power of Federal courts to interpret and enforce statutes.

Closely scrutinized, the Secretary's so-called statutory analysis argument in fact is an indirect attack on settled decisions of this Court as to the jurisdiction of the federal

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* Along with the State of New York and individual claimants, the City has commenced actions challenging the standards and practices used to determine eligibility by virtue of a mental illness disability, *City of New York, et al.* v. *Heckler, et al.* (No. CV83-0457 (E.D.N.Y.), and challenging the standards used to determine eligibility by virtue of a cardiovascular disability, *State of New York and City of New York, et al.* v. *Heckler, et al.*, No. 83 Civ. 5903 (S.D.N.Y.).

courts to review claims of violations of the SSA, the obligation of the courts to interpret statutory provisions which bind the Secretary, and the power and discretion of the courts to order appropriate and meaningful equitable relief. Cast in its true light, the Secretary's argument is without merit.

Mathews v. *Eldridge*, 424 U.S. 319 (1976), makes clear that federal courts have the jurisdiction to review claims of statutory violation such as are in issue here. Moreover, statutory interpretation is not an extraordinary event. It is the "everyday staple of judges," *National Petroleum Refiners Assn.* v. *F.T.C.*, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974), and a statutory standard under which an agency acts must '"get [its] final meaning from judicial construction.'" *Id.* at 693, *quoting*, *F.T.C.* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965). A court's order of injunctive relief is also a commonplace event, and, in fact, the propriety of the order herein was settled by this Court in *Califano* v. *Yamasaki*, 442 U.S. 682 (1979). *See* Point II, *infra*.

Specifically, the Secretary asserts that the issue on appeal "presents solely a question of statutory interpretion" (Pet. Br. at 20): "[W]hat, if anything, did Congress intend the Social Security Act to require with respect to the timing of ALJ hearings." *Id.* She argues that Congress, based on her review of post-enactment hearings, did not intend to impose fixed deadlines. *Id.* She then erroneously concludes that because Congress has not imposed across-the-board deadlines, a court may not interpret the statute as conferring any right upon disability claimants and may not afford relief to injured plaintiffs. From the Secretary's point of view, if the agency takes 10 years to schedule a hearing, a disability claimant has no recourse but to wait. Pet. Br. at 33.

The Secretary's analysis goes astray because she has collapsed the lower courts' interpretation of the statute with the relief ordered for violation thereof—two analytically distinct issues. Section 405(b) has been quite modestly interpreted as mandating that reviews be scheduled within a reasonable period of time, and that unexplainable lengthy delays are unreasonable. *See* Point I(A), *supra.** Therefore, the Secretary's arguments about undue interference by the courts grossly misinterprets the decision below, and reveal an underlying desire to avoid any scrutiny of her conduct. It is simply gross exaggeration, for example, for the Secretary to assert that the interpretation given to section 405(b) by the courts below constituted a "circumvent[ion]" of "congressional judgment" by substituting "their own version of what would be a 'reasonable' period of time within which to conduct a hearing." (Pet. Br. at 21). This confuses statutory interpretation with remedial relief.

The Secretary also elaborately exaggerates by asserting that the courts below did not duly take into account "all" the other factors besides timeliness that the state agency and HHS are obligated to consider; namely, "accuracy, fairnes, uniformity, efficiency, and economy" (Pet. Br. at 19), and "timeliness" (Pet. Br. at 36). But Congress has expressly indicated that there are only two: accuracy

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* The Court of Appeals for the Seventh Circuit in *Wright*, the lone dissenter among the circuits, agreed with the others as to the statutory mandate. It disagreed, because of the limited record before it, that the delays experienced in that circuit were unreasonable. *See Point* I(A) *supra*, at 7n.

and timeliness.* That is, plaintiffs have a right both to timely and accurate determinations and reviews.

As to the first, timeliness, the Secretary acknowledges, albeit with chagrin, that the lower courts gave due consideration to this criterion. Pet. Br. at 12-14, 31-33, 36. Moreover, this Court noted in *Heckler* v. *Campbell*, —— U.S. ——, 103 S.Ct. 1952, 1954 n.2 (1983), that precisely because of the large number of claims, "the need for efficiency [in the hearing process] is self-evident."

As to the second criterion—quality—the Secretary has had innumerable opportunities to demonstrate to the district courts that this consideration is the explanation for otherwise unaccountable delays, but has failed to do so.** The Secretary's brief does not cite to any evidence that lengthy delays have a beneficial effect on the quality of reviews. *See, e.g.*, Pet. Br. at 15-17, 19-21, 23-24, 33-36. Indeed, this bald assertion was expressly rejected by the court below precisely because categories of delay relating to improving the quality of determinations are exempt from the district court order. 685 F.2d at 22, nn. 6 & 7.***

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* The Secretary discusses the 1980 amendments to the SSA, which direct the Secretary to recommend time limits which take into account *two* needs: "expeditious processing of claims" and "accurately determined" claims. (Pet Br. at 26.) Similarly, the excerpted Senate Report states that this provision reflected Congress' desire for "speed and quality" of adjudication (Pet. Br. at 27). Thus, there are not six, but two, criteria imposed on the Secretary for claims determination.

** Even the *Wright* court's decision in favor of the Secretary was not premised on this ground, but on overburden. 587 F.2d at 352-53.

*** In addition, all delays in any way attributable to claimant are excluded from any outer limits on processing time. 685 F.2d at 22, nn. 6 & 7.

Furthermore, a major reason for the finding that plaintiffs are injured by these delays is the high reversal rates of initial denials and reconsiderations. *See, White, supra,* 559 F.2d at 858 (more than half for SSD claims); *Barnett, supra,* 580 F.2d at 31 & n.10 (almost half nationwide and more than a third in Vermont for SSI claims); *Caswell, supra,* 583 F.2d at 13 (nearly half for the entire New England region). Even the *Wright* court acknowledged the high reversal rates. 587 F.2d at 355. The Secretary, therefore, is disingenuous in asserting, and has never proved, that delays other than those attributable to the acquisition of new evidence are a function of the quality of the review. In fact, her own brief cites to a Congressional finding that the quality of adjudications is "somewhat suspect." Pet. Br. at 23-24.*

Nor has the Secretary ever proved her claim of overburden, upon which the *Wright* court based its decision and which she urges herein. Large numbers of claims processed, and requests for review of denials or terminations are cited to the courts. But numbers alone do not provide a basis for determining whether resources are adequate to the task. Furthermore, the so-called "explosion" in claims principally related to the addition of two new classes of eligibility: "black lung" claimants and SSI claimants, both of

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* The Secretary also cites to the separate opinions of Mr. Justice Brennan and Mr. Justice Marshall in *Heckler* v. *Campbell, supra,* —— U.S. at ——, 103 S.Ct. at 1959-62, to support the argument that the goal of quality of determinations engenders delay. Pet. Br. at 34. Those opinions, however, expressly criticized the *lack* of quality in the ALJ hearing at issue therein. *Heckler* v. *Campbell, supra,* —— U.S. ——, 103 S.Ct. at 1959-60 (Brennan, J., concurring); —— U.S. ——, 103 S.Ct. at 1960-61 (Marshall, J., concurring in part, and dissenting in part).

which occurred more than ten years ago.* In addition, while arguing overburden to the courts, the agency has reported to Congress that resolution of the backlog was at hand. *See, e.g., White, supra,* 559 F.2d at 860.

In any event, the SSA disability programs were enacted to lessen the financial burden on the disabled and on local governments and necessarily creates a burden on the federal government. *See supra,* at 4n. There is nothing in the SSA or its legislative history to authorize the Secretary to lessen the resulting burden on her agency at the expense of the intended beneficiaries.

POINT II

The equitable relief ordered by the District Court was well within its discretionary powers in that it provided relief that is both appropriate and limited to redressing plaintiffs' injuries.

As demonstrated in Point I, *supra,* section 405(b) provides a statutory right to disability claimants to have their requests for administrative review of claim denials processed within a reasonable time; the Secretary has violated that right of the plaintiff class in this action by allowing unreasonable and unaccountable delays in the review process; and, such delay produces an irreparable injury to the plaintiff class. Having thus proved a claim for relief, the plaintiff class was entitled to relief that would redress the injury.

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*Coal Mine Health and Safety Act of 1969, 30 U.S.C. §901, *et seq.*, Title XVI of the Social Security Act, 42 U.S.C. §1381, *et seq.* (1972). *See, White, supra,* 559 F.2d at 859.

The district court ordered two types of prospective injunctive relief: (1) a six-month deadline for the processing of requests for reconsideration and the scheduling of ALJ hearings in cases where processing is not delayed by the submission of new evidence or by any actions attributable to claimants; and (2) interim monetary relief to those claimants protected by the processing deadline where the Secretary violates that deadline, subject to recoupment if they ultimately are determined to be ineligible.

The Secretary argues that the court grossly overreached its powers by ordering such relief. Pet. Br., *passim*. In her "statutory analysis" argument, the Secretary continually refers to the court's order as constituting a statutory interpretation that all disability claimants seeking review are entitled to a six-month deadline for scheduling ALJ hearings. Pet. Br., at 26-30. Again, the Secretary misconstrues what the district court did, and in that process proffers arguments that do not bear on the issue before this Court.

District courts have broad discretionary powers to fashion appropriate equitable relief which is not subject to reversal by a reviewing court except for abuse of discretion; that is, it must lack a reasonable basis. *Milliken* v. *Bradley*, 433 U.S. 267, 281-83 (1977); *Hills* v. *Gautreaux*, 425 U.S. 284, 297 (1976); *Swann* v. *Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1, 15 (1971); *Rivers* v. *Schweiker*, 692 F.2d 871, 873 (2d Cir. 1982), *cert. denied*, 103 S.Ct. 1783 (1983), *citing*, *Kaynard* v. *Mego Corp.*, 633 F.2d 1026, 1030 (2d Cir. 1980).

Once a court determines that a statutory provision confers an enforceable right on a plaintiff, and such right has been violated, the court has available all its inherent powers to fashion a remedy except those that are prohibited in a particular case by the United States Constitu-

tion or by statute, either expressly or by clear implication. *See, e.g., Edelman* v. *Jordan,* 415 U.S. 651, 678 (1974) (the Eleventh Amendments limits relief against a state to prospective relief); *Adickes* v. *Kress & Co.,* 398 U.S. 144, 150-51 & n.5 (1970) (Congress expressly limited redress to injunctive relief for violations of Title II of the Civil Rights Act of 1964).

Nothing in the SSA prohibits the relief ordered here. The Secretary argues that Congress' repeated failure to impose deadlines is evidence that the relief ordered here is inconsistent with the statute. Pet. Br. at 20-31. This argument is both disingenuous and wrong.

The argument is disingenuous because the Secretary fails to admit to the role her agency played in thwarting Congressional imposition of deadlines.* Congress has repeatedly expressed its concern that the processing of applications takes too long. The Secretary has repeatedly (but inaccurately) informed Congress that the situation was well in hand and resolution of the problem was imminent. Having thus successfully forestalled Congress from taking action, the Secretary, when faced with court challenges to processing delays, then did an about-face and argued to the courts that Congress' failure to impose deadlines meant that Congress opposed their imposition.

The repeated concern of Congress over processing delays and its suggestions to the Secretary to issue deadline regulations shows that Congress believes that such deadlines are consistent with the SSA. *See, e.g., Heckler* v. *Campbell, supra,* —— U.S. at ——, 103 S. Ct. at 1957,

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* Rather than repeat the legislative history at issue, the City relies on such history presented in both Petitioner's and Respondents' briefs to demonstrate that the Secretary has repeatedly and affirmatively lulled Congress into inaction.

n.10.* The Secretary certainly does not argue that the agency is precluded from imposing deadlines, only that it has not chosen to do so.** Therefore, her argument that a court is prohibited by statute from doing so as a remedy for injuries caused by statutory violations is without merit.

The Secretary's argument also fails to recognize the federal courts' power to issue class relief. She euphemistically refers to the "program-wide relief" ordered by the court, but that is nothing more than class relief. This argument was lost when the court below granted class certification. Class relief in the instant case is at least as appropriate as the nationwide class certification and relief approved by this Court in *Califano* v. *Yamasaki*, 442 U.S. 682 (1979), to redress the Secretary's violation of disability claimants' statutory rights under section 204(a) of the SSA, 42 U.S.C. §404(a). 442 U.S. at 698-703.

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* "Since Congress amended the Social Security Act in 1954 to provide for disability benefits . . ., it repeatedly has suggested that the Secertary promulgate regulations defining the criteria for evaluating disability. . . While these sources do not establish the original congressional intent, they indicate that later Congresses perceived that regulations such as the guidelines would be consistent with the statute."

** Indeed, such regulations were issued in proposed form in response to a court order in *Blankenship, supra*, but then withdrawn. The withdrawal was not based on any claimed statutory prohibition. The Secretary's persistent refusal to issue uniform processing deadlines, even under court order, is the short answer to her complaint in this case that myriad court orders "balkanize" the administrative process. It is the Secretary's failure to adopt uniform deadlines in the face of myriad court orders that has "balkanized" the process. Furthermore, the Secretary raises this issue for the first time in this court. There are no facts in the record to support the assertion.

Yamasaki answers, favorably to the plaintiff class here, all the arguments as to relief raised by the Secretary. In *Yamasaki*, this Court found a statutory right to a face-to-face hearing on a request for waiver of recoupment, and approved a stay of recoupment decisions until such hearings took place, even though the statute did not expressly provide for either a hearing or a stay. In affirming class-wide prospective injunctive relief, the Court elaborated on the broad equitable powers of the federal courts, in particular under the SSA, and the need to impose equitable relief on a class-wide basis:

> The Secretary's reading of the statute is too grudging. Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction [cites omitted]. Nothing in either the language or the legislative history of §205(g) indicates that Congress intended to preclude injunctive relief in §205(g) suits.
>
> Injunctions can play an essential role in §205(g) litigation. Without the power to order a stay of recoupment pending decision, a court for all practical purposes would be unable to "reverse" a decision concerning prerecoupment rights. In class actions, injunctions may be necessary to protect the interests of absent class members and to prevent repetitive litigation. While the grant of injunctive relief makes the Secretary's duty to comply enforceable by contempt order, "[s]urely Congress did not intend §205(g) to provide reluctant federal officials with a means of delay in the remote eventuality that they might not feel bound by the judgment of a federal court." *Norton* v. *Mathews*,

> 427 U.S., at 535 (dissenting opinion).* The conclusion that injunctive relief is available under §205(g) is supported both by our implicit holding that a three-judge court was properly convened in *Jimenez* v. *Weinberger*, 417 U.S. 628 (1974), and by the opinions of four Courts of Appeals.**

Yamasaki, 492 U.S. at 705-06. The injunctive relief awarded herein is similarly authorized by section 205(g) of the SSA, 42 U.S.C. §405(g). Just as the claimants in *Yamasaki* were properly entitled to a stay of recoupment pending a hearing on their waiver request in order to give meaningful effect to the court's order that a hearing must be provided, claimants here are entitled to interim monetary relief for violation of the injunction as to processing deadlines in order to give meaningful effect to the court order.

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* Given that the district court would presume that the Secretary would "feel bound" by its judgment, and therefore not incur the award of monetary relief, her arguments as to the intrusiveness of the court in awarding such relief are overwrought in the extreme.

** One of the Courts of Appeals' decisions cited with approval by this Court is that of the First Circuit in *Caswell* v. *Califano*, *supra*. *Yamasaki*, 442 U.S. at 706 n.18. *Caswell*, like the instant case, imposed a classwide deadline of 90 days for scheduling ALJ hearings to review denials of benefits to disability claimants. 583 F.2d at 17-18. This Court's citation to *Caswell* was addressed to the principle that the traditional scope of the courts' equitable powers and their powers under Fed. R. Civ. P. 23 are not limited by 42 U.S.C. §405(g).

CONCLUSION

For all the foregoing reasons, the decision of the Court of Appeals should be affirmed.

September 26, 1983

Respectfully submitted,

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LEONARD KOERNER
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Of Counsel

No. 82-1371-CFX
Status: GRANTED

Title: Margaret M. Heckler, Secretary of Health and Human Services, Petitioner
v.
Leon S. Day, et al.

Docketed:
February 14, 1983

Court: United States Court of Appeals for the Second Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Munzing, Richard H.

Entry	Date	Note	Proceedings and Orders
1	Dec 6 1982		Application for extension of time to file petition and order granting same until February 14, 1983 (Marshall, December 7, 1982).
2	Feb 14 1983	G	Petition for writ of certiorari filed.
6	Feb 22 1983		Order extending time to file response to petition until April 4, 1983.
7	Apr 6 1983		Brief of respondents in opposition filed.
8	Apr 6 1983	D	Motion of respondents for leave to proceed in forma pauperis filed.
9	Apr 6 1983		DISTRIBUTED. April 22, 1983
10	Apr 20 1983	X	Reply brief of petitioner filed.
11	Apr 25 1983		Motion of respondents for leave to proceed in forma pauperis DENIED.
12	Apr 25 1983		Petition GRANTED.
			**********
13	Apr 25 1983		Printed Brief of Respondent in Opposition filed.
15	Jun 8 1983		Order extending time to file brief of petitioner on the merits until July 9, 1983.
16	Jul 8 1983		Order further extending time to file brief of petitioner on the merits until July 29, 1983.
17	Aug 5 1983		Lodging received. To be returned to the Department of Justice.
18	Aug 5 1983		Brief of petitioner filed.
19	Aug 10 1983		Joint appendix filed.
21	Aug 12 1983		Order extending time to file brief of respondent on the merits until September 26, 1983.
22	Aug 22 1983		Record filed.
23	Aug 22 1983		Certified original record & C.A. proceedings, 5 manila folders, received.
24	Sep 26 1983		Brief amicus curiae of The Alliance of Social Security Disability Recipients filed.
25	Sep 26 1983		Brief of respondents Leon S. Day, et al. filed.
26	Sep 26 1983		Brief amicus curiae of New York City filed.
27	Oct 18 1983		CIRCULATED.
29	Oct 24 1983		SET FOR ARGUMENT. Monday, December 5, 1983. (1st case) (1 hour)
31	Nov 28 1983	X	Reply brief of petitioner Heckler, Sec. of H&HS filed.
33	Dec 5 1983		ARGUED.